

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hooshfar Rokni Pezeshkian, Plaintiff

AND:

Re/Max Realtron Realty Inc., Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Malika Grewal, counsel for the moving party plaintiff

Max Skrow, counsel for the responding party defendant

HEARD: 1 June 2026

REASONS FOR DECISION

[1] The plaintiff seeks an order setting aside the registrar's dismissal of his action.

A. The Test

[2] The parties agree on the applicable test on this motion, which is well settled. The court must consider the following four factors:

- (i) Has the plaintiff provided a satisfactory explanation for the litigation delay?
- (ii) Has the plaintiff led satisfactory evidence to explain that he always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence?
- (iii) Has the plaintiff demonstrated that he moved forthwith to set aside the dismissal order as soon as the order came to his attention, and
- (iv) Has the plaintiff convinced the court that the defendant has not demonstrated any significant prejudice in presenting its case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action?

[3] The court is required to adopt an overall contextual approach that takes into account the factors above, as well as any other factors unique to the case. The overriding objective is to achieve a result that balances the interests of the parties and also takes account of the public's interest in the timely resolution of disputes. (See *Ferrari v. Sukhram* 2025 ONSC 6062, referencing *Hamilton v Svedas Koyanagi Architects Inc.* 2010 ONCA 887).

- [4] The order dismissing this action was issued 7 October 2024, but the plaintiff says he only learned of it in May 2025 when he attempted to file his trial record. The defendant concedes that the plaintiff moved promptly to bring this motion upon learning of the dismissal but otherwise argues that the plaintiff has met none of the other criteria and the dismissal order should stand.

B. The Facts as applied to the Test

1. Has the plaintiff provided a satisfactory explanation for the litigation delay?

- [5] This action was commenced in 2015. The plaintiff focused his submissions exclusively on explaining his delay between 2021 and 2025. But the period of six years, from 2015 to 2021, has not been explained, or even mentioned. In my view, this lack of explanation strongly favours dismissing the plaintiff's motion, if not being fatal to it.
- [6] The plaintiff argues that he obtained three timetable orders to ensure that the case moved forward. On 6 July 2021, Myers, J. issued a timetable that required the parties to exchange affidavits of documents by 31 July 2021, complete discoveries by 31 August 2021, answer undertakings by 1 November 2021, bring any undertakings or refusals motions by 30 November 2021 and set the action down for trial by 29 July 2022. After he obtained the order, the plaintiff made no attempt to meet any of these dates.
- [7] In July 2022, that timetable was amended on consent by Ramsay, J. The amended timetable extended the deadlines for delivery of affidavits of documents to 15 September 2022, for discoveries to 13 October 2022, for answers to undertakings to 12 December 2022, for refusals motions to 12 January 2023 and for mandatory mediation to 12 February 2023. It also amended the set down date to 31 March 2023.
- [8] Around the time this second timetable order was obtained, the lawyer for the defendant became ill. That situation continued beyond the dates set out in the amended timetable and, ultimately, it resulted in defendant's counsel transferring the file to another firm in November 2022. New counsel did not deliver an affidavit of documents until 7 March 2023, despite a number of follow ups from plaintiff's counsel. The discoveries, understandably, could not be completed by the 13 October 2022 deadline or the action set down by the 31 March 2023 deadline and another timetable amendment was sought.
- [9] Ramsay, J. initially refused to amend the timetable even though it was on consent, as she was not provided with any explanation for the delay. The plaintiff then filed a fulsome motion record explaining why the discovery dates and set down date had not been met. On 19 September 2023, Merritt, J. granted an order again amending the timetable. This order provided that discoveries were to be completed by 30 June 2023, answers to undertakings provided by 31 August 2023, refusals motions brought by 31 October 2023, mediation conducted by 31 December 2023 and the action set down for trial by 31 May 2024. (The discovery and undertakings deadlines had already passed by the date of her order, but that was the order requested by the plaintiff.) Discoveries took place on 11 April 2024 and, on

6 September 2024, the plaintiff sent the defendant its list of undertakings and sought answers “within the next 30 days as I would like to set the matter down for trial.”

- [10] On 25 April 2025, almost 11 months after the court-ordered set down date, the plaintiff sent the defendant his notice of readiness for pretrial conference. On 29 April 2025, his counsel circulated a draft certification form to set pretrial and trial dates. He served his trial record on 20 May 2025.
- [11] I do acknowledge that throughout much of this latter two year period, the defendant was slow to respond and the plaintiff often sent multiple follow up emails in order to get the defendant’s affidavit of documents or dates for discovery and mediation. But the plaintiff’s failure to set the action down for trial by the extended set down date of 31 May 2024 is critical.
- [12] Had he set the matter down as ordered by Merritt, J. or requested a more reasonable date, or at least obtained a further extension, the action would not have been dismissed and he would not face what is a significant test to have that order set aside and the action restored. When that timetable came and went, even if in part due to difficulty getting dates from the defendant, the plaintiff should have moved for a further extension before the deadline expired. He had to be hyper vigilant to ensure he complied with the set down date as he should have known that he would otherwise have to explain the six years of delay that occurred at the beginning of his action.
- [13] Had this action been commenced in 2020, I would accept that the plaintiff had provided a satisfactory explanation for the litigation delay and had led satisfactory evidence to explain that he always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence. But this action did not commence in 2020. It commenced in 2015. Nothing happened for four years, until November 2019, when the plaintiff delivered an affidavit of documents. After that, there was silence on the file again for another almost two years, until the first timetable order was made in July 2021. Even after obtaining that 2021 timetable, nothing happened until June 2022. This was despite the fact that the court had ordered that the parties were to have exchanged their affidavits of documents, completed discoveries, answered their undertakings, and brought any undertakings or refusals motions by the end of 2021. The new set down date of 29 July 2022 was a month away and none of these steps had been taken.
- [14] The timetables do not provide a pass for the prior six years of delay. Nor do they make unnecessary the need for the plaintiff to provide a satisfactory explanation for “the litigation delay”. The delay to be explained is the delay over the action as a whole – from the initiation of the claim to the date of the dismissal order (*Ferrari, supra* at paragraphs 11 and 30) and it is incumbent on the plaintiff to lead that evidence.
- [15] The Court of Appeal addressed this argument in *1196158 Ontario Inc. v. 6274013 Canada Limited* 2012 ONCA 544 (“*1196158*”), on strikingly similar facts.

- [16] In that case, the action was commenced in 2006. The plaintiff had not set the action down for trial within two years of the filing of a defence, as was then required, and a status notice was issued in October 2008, under the then rule 48.14. In fact, in those two years, the *1196158* action had not progressed beyond the pleadings stage. In the case before me, the matter did not progress much beyond the pleadings stage for six years.
- [17] In *1196518*, a status hearing was held in January 2010, and a timetable was agreed upon, requiring discoveries to be completed and the action set down for trial by June 2011. The order provided that if the action was not set down by that date, a further status hearing was to be conducted on 13 September 2011. It was not set down and at the September 2011 status hearing, the judge dismissed the action. He characterized the first status hearing order as a “lifeline”, which the plaintiff had ignored. He came to this conclusion, even though the original status hearing order referenced that a further status hearing would be held in the event the action was not set down by the original date.
- [18] The dismissal was upheld on appeal. The court rejected the plaintiff’s argument that the earlier timetable had forgiven the prior period of delay. As the court stated:
- [25] I completely disagree with the contention that the plaintiff was somehow absolved for all prior delay by the order made at the January 2010 status hearing. That order, made despite over three years of delay, was properly described by the September 2011 status hearing judge as a “lifeline” that allowed the plaintiff to proceed on the basis of the timetable ordered. The plaintiff ignored the lifeline it had been given and failed to respect the timetable that had been set. Without repentance, there can be no absolution. The plaintiff did not emerge from the January 2010 status hearing with a clean slate and it was open to the status hearing judge to consider the entire history of delay.
- [19] In upholding the dismissal, the Court of Appeal held that “the conduct of a defendant may be relevant, especially where a plaintiff who tries to move an action along is faced with “some resistance” from the defendant, or tactics that are not “consistent with a willingness to see a relatively straightforward case proceed expeditiously” (paragraph 29), but the solution was to request an extension of the timetable before set down date had passed.
- [20] The plaintiff has not provided a satisfactory explanation for his delay over the life of this action, a factor militating against setting aside the dismissal order.
- 2. Has the plaintiff led satisfactory evidence to explain that he always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence?**
- [21] I accept that the action was not set down due to inadvertence. There is no solicitor’s affidavit saying so, but the record shows the plaintiff was requesting discovery dates so that he could set the action down, and preparing his notice of readiness for trial.
- [22] However, as noted, there is not a word in the plaintiff’s lengthy motion record to explain why almost nothing happened in the first five years of this action. One cannot look at a

period of five and a half years of unexplained silence, but for an affidavit of documents at the four year mark, and reasonably conclude that the plaintiff always intended to prosecute his action. Even if the plaintiff had provided an affidavit affirming that that was his intention, it would have been contradicted by his failure to do that very thing from 2015 to 2021, and his failure to take any steps to comply with the 2021 court ordered timetable.

- [23] While the plaintiff has demonstrated that the failure to set the action down was through inadvertence, he has not provided satisfactory evidence to explain that he always intended to prosecute his action within the time limits set out in the rules and the further court orders. This militates against setting aside the dismissal order.

3. Has the plaintiff convinced the court that the defendant has not demonstrated any significant prejudice in presenting its case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action?

- [24] The burden is on the plaintiff to convince the court that the defendant has not demonstrated any significant prejudice as a result of the delay.

- [25] Once a case has reached the five year mark and not been set down for trial, it begins to “move into the realm of inordinate delay” and there is an automatic presumption of prejudice. Although this principle was raised in the context of a motion to dismiss for delay, this approach remains apt, particularly with the court’s focus post *Hryniak v Mauldin* 2014 SCC 7 on effecting a culture shift away from delay and toward prioritizing prompt judicial resolution of cases.

- [26] The plaintiff points to the fact that the case is ready for trial. Productions are complete, discoveries have concluded and undertakings have been answered, a point the defendant challenges. He also notes that the defendant attempted to excuse its own delays in the 2023/2024 period by arguing that the action was old by then and that its delays in promptly providing its affidavit of documents or discovery dates were not causing any prejudice.

- [27] In response the defendant led evidence that it will suffer real prejudice if the action is restored as its main witness, the plaintiff’s supervisor, is no longer able to testify.

- [28] The plaintiff claims damages for wrongful dismissal. He also seeks punitive damages based on an allegation that his supervisor, Mr. Pilarski, asked him to sign a resignation letter and then replaced him with another employee when he refused to do so. The plaintiff also alleges that Mr. Pilarski made disparaging comments about him. These are pleaded as grounds for a \$250,000 punitive and aggravated damages award.

- [29] It is evident that Mr Pilarski will not be able to testify. While he was diagnosed with Parkinson’s disease in 2019, he did not exhibit any symptoms until July 2021, when his ability to verbally communicate became difficult and his memory started to suffer. His condition worsened to the point that the defendant advised the plaintiff in early 2023 that Mr. Pilarski would not be able to be examined as the defendant’s representative for discovery. As at the date of this motion, Mr. Pilarski is unable to express himself verbally.

- [30] The plaintiff raises three arguments in response to the defendant's argument of real prejudice. First, he argues that transcript of Mr. Pilarski's discovery is available to be read in at trial, should Mr. Pilarski be unable to attend. Because this transcript exists, a fair trial is possible. These submissions in the plaintiff's factum are factually incorrect. Mr. Pilarski was not examined for discovery on behalf of the plaintiff. Where the plaintiff relies on the existence of this transcript to secure a fair trial, one might reach the opposite conclusion and find that a fair trial is not possible when such a transcript does not exist.
- [31] Second, he argues that the defendant's stall tactics starting in 2022 were the main reason the action did not move forward. But for that delay, the action would have moved forward and Mr. Pilarski could have testified. That submission seems unlikely on the evidence before me as Mr. Pilarski was already unable to testify by 2023.
- [32] Third, he argues that this is a documentary case and the evidence of Mr. Pilarski is not critical. This is particularly so when the plaintiff advised that he was prepared to withdraw the punitive damages portion of his claim, which is exclusively focused on Mr. Pilarski's conduct, should the dismissal be set aside.
- [33] The defendant disputes that the plaintiff was an employee at all, pleading that he was an independent contractor. If this were a documentary case alone, the defendant would tender the plaintiff's signed independent contractor agreement and definitively prove his relationship status with the defendant.
- [34] Because the plaintiff intends to argue that he was an employee, even though he signed the independent contractor agreement, he will presumably testify about the defendant's and Mr. Pilarski's control over his schedule and the other indicia of an employment relationship. The plaintiff has not demonstrated that the defendant will not suffer significant prejudice by not being able to call Mr. Pilarski to refute the plaintiff's testimony. The communications between the plaintiff and Mr. Pilarski were primarily verbal, so it is not a case where there are emails that can stand in place of Mr. Pilarski's testimony. It could have been argued that this prejudice predated the dismissal order, but the plaintiff did not argue this before me. Further, the plaintiff has not pointed to any other witnesses that the defendant could call to prove its version of the relationship or the degree to which the plaintiff's activities were or were not subject to the defendant's control.
- [35] I am not satisfied that the plaintiff has demonstrated that the defendant will not suffer any significant prejudice in presenting its case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action. This factor militates against setting aside the dismissal order, albeit perhaps less so than the other factors, given the date of the onset of Mr. Pilarski's illness.

C. Conclusion

- [36] The other factor supporting a dismissal of this action is that is a simplified rules action. A simplified rules stream was introduced to "minimize costs and delay and streamline claims so that they can proceed to trial as expeditiously and efficiently as possible" (*Blue v Metro*

Ontario Inc. 2022 ONSC 1283). As Ramsay, J. noted in dismissing the request for an extension of the timetable in 2023,

“2. This action is proceeding under the simplified procedure. The objective of the rule is to [ensure] actions proceed more expeditiously and [are] determined in the least expensive manner on the merits. Amendments to rule 76, ushered in at the commencement of January 1, 2020, imposed a cap on costs and disbursements. This “urgent” motion to vary is made two days before the deadline to comply with setting the action down for trial. It has now been one year and eight months since Myers J.’s original timetable order and eight (8) months since my own order varying, on the consent of the parties, the timetable order.”

- [37] Given the significant periods of inactivity over the years on this file, I find the principle of finality outweighs the interest in having the action heard on its merits (*Ferrari, supra* at paragraph 52). Having considered all the factors, I conclude that the registrar’s dismissal order should not be set aside and the plaintiff’s motion is hereby dismissed.

D. Costs

- [38] The defendant is presumptively entitled to its costs of the motion and the dismissed action. It seeks an all-inclusive costs award of \$23,000 for the entire proceeding, including the costs of this motion. Given its partial indemnity costs of this motion alone are listed at \$9,367.80, and considering the factors set out in rule 57.01, I find the sum of \$23,000 for the entire action (pleadings, productions, discoveries, mediation, dismissal motion, tax and disbursements) to be reasonable and an amount that the plaintiff could expect to pay for costs in all of the circumstances of the motion. The plaintiff shall pay the defendant its partial indemnity costs in the all-inclusive amount of \$23,000.

Associate Justice Jolley

Date: 8 June 2026