

CITATION: Essex Condominium Corporation #30 v. Economical Mutual Insurance Company
2026 ONSC 5027

COURT FILE NO.: CV-20-00029378-0000

DATE: 20260902

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Essex Condominium Corporation #30

Plaintiff

– and –

Economical Mutual Insurance Company,
Aviva Insurance Company of Canada,
Royal & Sun Alliance Insurance Company
of Canada, a.k.a. RSA Insurance Company
of Canada & Leendert John Meyer and
Johnathon Trout Meyer, the Litigation
Administrators for the Estate of Lillyan
Meyer

Defendants

Anita Landry and Raymond Colautti, for the
Plaintiff

Christopher P. Klinowski, for the Defendant,
Economical Mutual Insurance Company

Michael Saelhof, for the Defendants, Aviva
Insurance Company of Canada and Royal &
Sun Alliance Insurance Company of Canada,
a.k.a. RSA Insurance Company of Canada

Nicole D. Rogers, for the Defendants,
Leendert John Meyer and Johnathon Trout
Meyer, the Litigation Administrators for the
Estate of Lillyan Meyer

HEARD: June 1, 2026

RULING ON MOTION

HEBNER J.:

- [1] The plaintiff moves for leave to bring a motion for summary judgment. For the reasons that follow, leave is granted.

Background

- [2] The plaintiff, Essex Condominium Corporation #30 (“ECC #30”), is the condominium corporation for a 12-storey building with an atrium and an elevated pool above a parking garage. Lillyan Meyer was a resident of the condominium at the time of the events. On November 23, 2018, Ms. Meyer crashed her motor vehicle into the exterior corner of the

atrium, causing the glass in the atrium walls to shatter. Some of the glass was knocked into the pool.

- [3] The pool was drained on November 23, 2018, by the condominium building manager to allow for the removal of the glass. While the pool was drained and in the process of being refinished, a crack was observed in the concrete bottom of the pool. The crack was repaired and pool finishing was completed.
- [4] On April 6, 2019, the condominium building manager started to fill the pool with water. He stopped before the deep end was full because cracks and leaks appeared.
- [5] The pool was eventually repaired. The cost of the repairs not covered by insurance and paid directly by the plaintiff is \$258,798.25. On February 20, 2025, an appraisal award was issued quantifying the plaintiff's damages as: replacement cost value \$271,179.73; and actual cash value \$242,985.73.
- [6] There are two insurers that the plaintiff asserts ought to respond to the loss. They are:
 - 1. Economical Mutual Insurance Company pursuant to a policy purchased by the plaintiff covering the period of April 1, 2018, to April 1, 2019; and
 - 2. Aviva Insurance Company of Canada pursuant to a policy purchased by the plaintiff covering the period of April 1, 2019, to April 1, 2020.
- [7] The issues in the case articulated by the plaintiff are:
 - 1. Was all or any part of the loss caused by the motor vehicle driven by Lillyan Meyer?
 - 2. Is Lillyan Meyer's estate liable for any of the damage that caused the loss?
 - 3. Is Economical liable to indemnify the plaintiff for the loss?
 - 4. Is Aviva liable to indemnify the plaintiff for the loss?
- [8] The defendants have all crossclaimed against each other.
- [9] The defendants assert that the following questions will need to be answered to resolve the case:
 - (a) What was the cause of the crack(s)/leak(s) discovered on April 6, 2019; and in particular:
 - (i) When was/were that crack/those cracks formed?
 - (ii) What were the factors that caused the crack(s) to form?
 - (b) Is either property insurer obligated to cover these losses/costs pursuant to their policies of insurance in place?

- (i) Are there exclusions or limitations in the relevant policies of insurance that come to bear on the plaintiff's claim, and if so, what is/are their effect(s)?

The Issue on the Motion

- [10] The action was set down for trial by the plaintiff in March of 2025. All parties attended assignment court on June 11, 2025 when a pre-trial was set for February 9, 2026. On November 11, 2025 the plaintiff served its motion for summary judgment, also seeking leave. The summary judgment motion has been scheduled for November 12, 2026, subject to leave being granted. The matter has not yet been scheduled for trial.
- [11] The plaintiff mistakenly said that the appraisal award was dated February 20, 2026, when it was dated February 20, 2025. Accordingly, the award was released prior to the plaintiff setting the action down for trial. The appraisal award therefore cannot constitute a change in circumstances arising after the action was set down for trial.
- [12] The plaintiff points to one event that occurred after the matter was set down for trial, namely the plaintiff's discovery of an intra-defendant agreement that was disclosed for the first time in the pre-trial memorandum dated February 2, 2026, filed on behalf of the Estate of Meyer for the pre-trial conference held on February 9, 2026. Paragraph 34 of that memorandum, which sets out the Estate's characterization of the agreement, reads:
34. The repairs to the building structure identified in the Appraisal Award were fully completed by Parker DKI, funded by ECC #30's insurer Economical in the amount of \$90,970 for repairs and \$3,381 for emergency work. Economical, in turn advanced a subrogated demand against Mrs. Meyer's insurer. Mrs. Meyer's automobile insurer acknowledged responsibility and ECC #30's \$5,000 deductible was waived. By agreement between them, Mrs. Meyer's auto insurer reimbursed Economical in the amount of \$80,198.35 on September 8, 2020, which was considered payment in full for the damages caused by the motor vehicle accident. Put another way, ECC #30 has already been made whole, the defendant driver has already paid these damages in full, and nothing further is payable to the plaintiff by the deceased's estate.
- [13] At the pre-trial conference, counsel for Economical also revealed that, through an arrangement between the insurers, "Economical was taking the lead" in responding to the summary judgment motion.
- [14] Before the pre-trial conference, none of the defendants or their counsel had disclosed the existence of these agreements to counsel for the plaintiff, and their terms have still not been disclosed.
- [15] The plaintiff has brought a motion for an order that the defendants produce a copy of any agreements and/or payments between them regarding this action. My endorsement of June

1, 2026, sets the date of October 2, 2026, for the hearing of that motion and timelines for the filing of materials and cross-examinations.

Positions of the Parties

- [16] The plaintiff asserts that leave to bring the summary judgment motion ought to be granted because the plaintiff's damages have now been quantified by the appraisal award and the material facts are not disputed. The plaintiff asserts that the proposed summary judgment motion is a proportionate and efficient means of resolving, or at least substantially narrowing, the remaining issues without the time and expense of a full trial.
- [17] The defendants assert that the motion for leave ought to be dismissed. They say that a number of key facts remain to be determined with *viva voce* evidence at a trial and that a motion for summary judgment cannot resolve the issues. They say that the appraisal report does not necessarily quantify the plaintiff's damages. They say they have "the substantive right to have the cause and timing of the leak be determined on a full evidentiary record".

Analysis

- [18] Rule 48.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, reads as follows:

48.04 (1) Subject to subrule (3), a party who has set an action down for trial shall not initiate or continue any motion or form of discovery without leave of the court.

- [19] The purpose of the rule is set out in the decision of Chappel J. in *Cromb v. Bouwmeester*, 2014 ONSC 5318, at para. 21:

Rule 48.04(1) is reflective of the point which the court emphasized in *Hill v. Ortho Pharmaceuticals (Can.) Ltd.* (1992), 11 C.P.C. (3d) 236 (Ont. Gen. Div.) that "setting a matter down for trial is not a mere technicality of procedure." The purposes of Rule 48.04(1) are to ensure that matters are not set down for trial until they are actually trial-ready, to avoid unreasonable delays occasioned by further discoveries or additional steps once trial time is booked, and to protect against the loss of valuable trial time that occurs when matters are removed from the trial list at a late stage due to the commencement of further last minute interlocutory proceedings. (*Hill, ibid.*; *Fruitland Juices Inc. v. Custom Farm Service Inc.*, [2012] O.J. No. 4050 (S.C.J.)).

- [20] In *Fulop v. Corrigan*, 2020 ONSC 1648, at paras. 76 and 77, Perell J. discussed the approach to be taken when considering leave to bring a motion after setting a case down for trial:

Once a party has set an action down for trial, it is a matter of discretion in the particular circumstances of the case whether the court will grant leave

to initiate or continue a motion or form of discovery. However, the setting down for trial is not a mere technicality, and there must be a justification for permitting further discovery or any other interlocutory step such as a substantial or unexpected change in circumstances or the necessity of the step in the interests of justice.

The predominant contemporary approach to whether leave should be granted is a flexible approach that recognizes that there may be no single test for leave to initiate or continue a motion or form of discovery, and the weight to be given the various discretionary factors will depend upon the circumstances of the particular case. In considering whether there is justification for granting leave, the court may consider a variety of factors including: (1) what the party seeking leave knew at the time of the passing of the trial record; (2) whether there has been a substantial or unexpected [change] in the circumstances since the action was set down for trial; (3) the purpose of the request for leave; (4) the nature of the relief being requested; (5) whether the party opposing the relief would suffer any prejudice; and (6) whether the relief sought would likely be granted if leave were given to bring the motion notwithstanding the filing of the trial record.

- [21] The plaintiff seeks to bring a motion for summary judgment – a step that would save significant court time. The plaintiff points out that such a motion can be completed within a day whereas a trial would require two weeks. In *Loops L.L.C. v. Maxill Inc.*, 2024 ONSC 7194, Tranquilli J. dealt with a request by the plaintiffs for leave to bring a motion for partial summary judgment. At para. 18 she said:

I agree with the parties that within the context of a proposed summary judgment motion, the appropriate test is whether the interlocutory step is in the interests of justice. For example, if a summary judgment motion is less costly and time-consuming than trial and will not unduly delay the start of trial, the motion is in the interests of justice: *Fruitland Juices Inc. v. Custom Farm Service Inc.*, 2012 ONSC 4902. To that end, I have adopted the flexible approach outlined in *Fulop* and considered the various discretionary factors identified in that decision: *Fulop* at para. 77.

Of note, Tranquilli J dismissed the motion for leave for several reasons. In short, she was not persuaded that, in the circumstances of that case, a motion for partial summary judgment would prove cheaper for the parties in the end.

- [22] In *Fruitland Juices Inc. v. Custom Farm Service Inc.*, 2012 ONSC 4902, 112 O.R. (3d) 453, Quinn J. dealt with a motion brought by the defendant for leave to bring a summary judgment motion after the defendant had set the action down for trial. In granting leave, Quinn J. said, at para. 28:

The requirement for a substantial and unexpected change in circumstances is not a helpful or logical test where the motion for which leave is requested seeks summary judgment. The primary purpose of such a motion is to spare

the parties and the legal system the expense and intrusion of an unnecessary trial or, at least, unnecessary issues within the trial. A party is not obliged to bring a summary judgment motion at the earliest opportunity; neither must there be a precipitating event such as a change in circumstances. So long as the motion, if successful, will be less costly and time-consuming than the trial, and will not unduly delay the start of the trial, I do not see why the moving party must explain his or her choice of timing. In other motions (such as to add parties, raise new issues or amend pleadings), the explanation for a delay in so moving is relevant, as is the issue of prejudice to the opposing party. However, none of that is relevant or required in a motion for summary judgment, at least in the circumstances of this case. A summary judgment motion brought at any time is a potential blessing for the administration of justice.

- [23] There has been no substantial or unexpected change in circumstances since the plaintiff set the matter down for trial. But that is not the test on a motion for leave to bring a summary judgment motion. The disclosure of the intra-defendant agreement in February 2026 does not change that. The agreement is the subject of the separate production motion returnable October 2, 2026, and it has no bearing on whether a summary judgment motion is the more efficient route to resolving this action.
- [24] I agree with the comments of Quinn J. in *Fruitland Juices*. The test for the application of the rule against motions after setting a case down for trial, for motions such as more disclosure, further examinations for discovery, amending pleadings or adding new issues, is as set out in *Fulop*. These are matters that ought to be dealt with before a matter is set down. The test for a summary judgment motion is as set out in *Fruitland Juices* and *Loops*. A motion for summary judgment should come down to whether court time could be saved and expenses to parties reduced.
- [25] In this case I see no reason why a summary judgment motion could not resolve the matter. Summary judgment motions routinely resolve complicated cases with credibility issues through cross-examination on affidavits. This case is no different.
- [26] The defendants assert that the issue of whether re-filling of the pool caused further cracking, or the mechanism of the cracking and when the cracking occurred, remains a key fact that must be determined. They assert that there are multiple discordant expert opinions on the issue and on the cause and timing of the leaks. It appears that the defendants insist that the multiple experts be cross-examined in court during a full trial.
- [27] I disagree with the position of the defendants. I see no reason why experts could not be cross-examined on their reports ahead of the motion with transcripts filed. If the motions judge believes that some *viva voce* evidence is required, then they have the remedy of a mini-trial.
- [28] Moreover, there is the appraisal already completed such that liability could be a question of what if anything is covered under each of the policies.

- [29] If a two-week trial could be dealt with in one or two days, then steps should be taken to make that happen. Court time is precious. Parties wait many months and sometimes years to have their disputes dealt with. If we can take steps to reduce the wait time, then we should do so.

Disposition

- [30] For these reasons, the plaintiff shall have leave to proceed with its summary judgment motion. The plaintiff was successful on the motion for leave and so is entitled to costs. The plaintiff did not submit a costs outline. The defendant Aviva did, claiming partial indemnity costs of \$8,344. The plaintiff's costs would, I expect, be somewhat higher given additional work to prepare motion materials and reply.
- [31] I assess the plaintiff's reasonable costs on the motion for leave at \$10,000 and order that the defendants pay those costs within 30 days.

Pamela L. Hebner
Justice

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Hebner J.

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