CITATION: 2249419 Ontario v. Subramaniam, 2026 ONSC 6348
COURT FILE NO.: CV-22-00682210-0000
DATE: 20261112

2026 ONSC 6348 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *2249419 Ontario Inc. v. Eesan Subramaniam and Shirin Alishri*

BEFORE: Associate Justice Rappos

COUNSEL: *Jeffrey Silver*, for the Defendant Eesan Subramaniam

Bruce Jaeger, for the Plaintiff

Abba Katz, for the Defendant Shirin Alishiri

HEARD: June 17, 2026 (in person)

ENDORSEMENT

[1] The Defendant, Eesan Subramaniam brings a motion for an order dismissing the action for delay. Subrule 24.01(1)(c) of the *Rules of Civil Procedure* provides that the Court may dismiss an action for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings.

[2] An action will be dismissed for delay where the delay is (i) inordinate, (ii) inexcusable, and (iii) results in a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay, whether through an unrebutted presumption of prejudice or by evidence of actual prejudice to the defendant's ability to have the case adjudicated on its merits.[1]

[3] The test for dismissal for delay is conjunctive. To succeed on a motion under subrule 24.01, the moving defendant must satisfy all three components of the test.[2]

[4] In *Barbiero v. Pollack*, Brown J.A. considered the approach established by the Court of Appeal in *Langenecker v. Sauvé*, and noted that under the approach, delay or passage of time on its own cannot constitute harm or prejudice sufficient to support the dismissal of an action and merely gives rise to a rebuttable presumption of prejudice.[3]

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[1] *Barbiero v. Pollack*, 2024 ONCA 904 [**"*Barbiero*"**], para. 8, citing *Langenecker v. Sauvé*, 2011 ONCA 803.
[2] *NWG Investments Inc. v. Fronteer Gold Inc. et al*, 2023 ONSC 4826, para. 17, affirmed *NWG Investments Inc. v. Fronteer Gold Inc.*, 2024 ONCA 331.
[3] *Barbiero*, para. 13.

[5] Justice Brown held that "[t]o the extent that *Langenecker* denies that the passage of time, on its own, can constitute sufficient prejudice to dismiss an action for delay and not simply a rebuttable presumption of prejudice, it should not be followed."[4]

[6] Justice Brown also held that to be "inordinate", a delay must be unusually large or excessive. Justice Brown noted that there was a benchmark under the *Rules* that set out the ordinary or normal amount of time that it should take a civil proceeding to move from its initiation to its setting down for trial. The benchmark is the five-year period provided under subrule 48.14(1) where the registrar shall dismiss the action if it has not been set down for trial.[5]

[7] Justice Brown concluded that "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'.[6]

[8] This action was commenced on June 6, 2022 by way of a statement of claim. The Defendants each served a demand for particulars, which the Plaintiff responded to on July 14, 2022. Mr. Subramaniam brought a motion for an order striking the statement of claim or, in the alternative, requiring the Plaintiff to provide the particulars demanded by the Defendants. A consent order was granted by Associate Justice McGraw on June 13, 2023, which provided that leave was granted for the Plaintiff to issue an amended statement of claim, and the motion was otherwise dismissed and no further motions for particulars could be brought.

[9] The statement of claim was amended on July 18, 2023 pursuant to the consent order.

[10] Mr. Subramaniam served a notice of motion dated September 17, 2025 where he indicated he was seeking an order dismissing the action for delay. The notice was served just over 3.25 years after the claim was started, and just under 2.25 years after the statement of claim was amended on consent.

[11] The motion was heard by the Court just after the four-year anniversary of the commencement of the claim.

[12] Mr. Subramaniam argues that the delay in this case is inordinate, and that the Plaintiff has failed to satisfy its burden of moving the action to its final disposition on the merits. In his factum, Mr. Subramaniam says that "[t]here is no set amount of time that will make delay qualify as 'inordinate'. Each case is fact specific."

[13] I do not believe that to be a proper statement of the law of this Province as set out in *Barbiero v. Pollack*, where Brown J.A. held that a case will cross into the realm of inordinate delay after the expiry of the five-year period to set the action down for trial.

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[4] *Ibid.*, para. 15.
[5] *Ibid.*, paras. 20-22.
[6] *Ibid.*, para. 22.

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[14] Mr. Subramaniam relies on the decisions of this Court in *Beshay v. Labib* and *Rosswill Pools 1995 Ltd. v. Mandarino* as examples of four-year-old cases that have been dismissed for delay.

[15] Mr. Subramaniam is incorrect in this submission, as in *Beshay v. Labib*, the action was commenced on December 22, 2016, and the plaintiff brought a motion to extend the time to set the matter down for trial as more than five years had passed since the claim was started.[7]

[16] In *Rosswill Pools 1995 Ltd. v. Mandarino*, the action was commenced in January 2021 under the *Construction Act*. The motion was heard approximately 4.75 years after the claim was issued.[8]

[17] Subrule 24.01(c) was not at issue in that case, and Associate Justice Robinson held that "the entirety of rule 24.01 is inconsistent with the *Construction Act* and its regulations."[9] The case was decided under section 47 of the *Construction Act*, and Robinson A.J. noted that "incorporating and applying the stricter requirements under rule 24.01 in a lien action is inconsistent with that discretion and unnecessary."[10]

[18] Associate Justice Robinson held that while the principles under subrule 24.01(1) could provide relevant guidance to dismissal for delay in lien actions, they are not to be viewed as a "test", as to do so would limit the broad discretion under section 47 of the *Construction Act*. In discussing the principles, Associate Justice Robinson did not refer to the ruling on inordinate delay in *Barbiero v. Pollack*.[11]

[19] Associate Justice Robinson determined that there was an inordinate delay in the case before him since the defendants had not been served with the statement of claim, and section 37 of the *Construction Act* requires a lien action to be ready for trial within two years.[12]

[20] Given that Associate Justice Robinson's decision is based on the interpretation of the *Construction Act*, which has a different timeline and rules regarding the progress of the action, and as he specifically held that rule 24.01 did not apply, his decision is not applicable to the case at bar.

[21] Mr. Subramaniam also referred to *Tracey v. Leon's Furniture*, where at the time the motion at issue was heard "the action itself is almost four years old without having progressed beyond pleadings and affidavits of documents."[13]

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[7] *Beshay v Labib*, 2023 ONSC 2874, para. 1 and 3.
[8] *Rosswill Pools 1995 Ltd. v. Mandarino*, 2025 ONSC 7212, paras. 11 and 13.
[9] *Ibid.*, para. 7.
[10] *Ibid.*, para. 8.
[11] *Ibid.*, paras. 8 and 9.
[12] *Ibid.*, para. 22.
[13] *Tracey v. Leon's Furniture*, 2012 ONSC 6116, para. 58.

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[22] However, that case dealt with a motion by a plaintiff to set aside the order of the registrar dismissing the action for delay under rule 48.14(5). At the relevant time in that case, the plaintiff was required to set an action down for trial within two years after the first defence was filed. The action was commenced on December 23, 2008. The statement of defence was delivered on May 3, 2010. The registrar dismissed the action on June 1, 2012.[14]

[23] *Tracey v. Leon's Furniture* is wholly distinguishable to the case at bar, as it was decided under a different regime under the *Rules* and did not engage subrule 24.01.

[24] Mr. Subramaniam also relies on *Pezeshkian v Re/Max Realtron Realty Inc.*, which is a case dealing with a motion to set aside the registrar's dismissal of the action. The action was commenced in 2015 and was dismissed in October 2024.[15]

[25] Mr. Subramaniam relies on the case because Associate Justice Jolley held that a factor supporting a dismissal of the action was because it was a simplified rules action, as is this action, and the simplified rules stream is intended to ensure that actions proceed more expeditiously.[16]

[26] I do not disagree with the comment concerning the intention behind simplified procedure cases for faster resolution of litigation. However, there is nothing in rule 76, which governs simplified procedure actions, that changes the test to dismiss an action for delay under subrule 24.01. And, like the other cases, the facts in *Pezeshkian v Re/Max Realtron Realty Inc.* are distinguishable since there was a nine-year period between the commencement of the action and when it was dismissed for delay.

[27] Mr. Subramaniam also argues that, because the Plaintiff alleges in his claim that the Defendants carried out transfers of title to three properties with the intent of delaying or defeating Mr. Subramaniam's creditors and were fraudulent conveyances under the *Fraudulent Conveyances Act*, the Plaintiff is required to move the matter along at a faster pace.

[28] In *NWG Investments Inc. v. Fronteer Gold Inc. et al*, Justice Steele held that the nature of an allegation of fraud is such that it warrants a faster resolution. "Proceedings such as these should move quickly to determine whether the allegations are warranted. Having allegations that go to the root of one's character outstanding and unresolved for a prolonged period of time is highly stressful and potentially damaging. It is different than having an outstanding contract dispute, for example."[17]

[29] However, in that case, there was inordinate delay of either approximately 8 years or 10 years.[18] In the Alberta Court of Appeal case relied on by Justice Steele, *Humphreys v. Trebilcock*, which discussed the principle of a plaintiff in a fraud case moving an action at a faster pace than

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[14] *Tracey v. Leon's Furniture*, 2012 ONSC 6116, paras. 1, 2, 4, and 9.
[15] *Pezeshkian v Re/Max Realtron Realty Inc.*, 2026 ONSC 3382, paras. 1, 4 and 5.
[16] *Ibid.*, para. 36.
[17] *NWG Investments Inc. v. Fronteer Gold Inc. et al*, 2023 ONSC 4826, para. 31.
[18] *Ibid.*, para. 28.

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expected of a reasonable litigation,[19] there was a 9.5 year period between the commencement of the claim and when the motion for dismissal was brought by the moving party.[20]

[30] In *Deutsche Postbank AG v. Kosmayer*, which also cited the Alberta Court of Appeal decision and was a fraud case referred to by Justice Steele, the action was commenced over nine years before the motion to dismiss was heard.[21]

[31] I do not dispute the decisions of this Court that fraud actions should be pursued at a faster pace than non-fraud cases. However, in each of the cases relied on by Mr. Subramaniam, the delay exceeded eight years. I think it would be overreach to apply the fraud principles from these cases to this case, as it would require a plaintiff in a fraudulent conveyance case to move a case far faster than the five year period to set down an action for trial that is provided for in the *Rules* and is the beginning of the inordinate delay period as noted in *Barbiero v. Pollack*.

[32] Mr. Subramaniam has not satisfied me that there is inordinate delay in this case under subrule 24.01 because the Plaintiff failed to set the action down for trial in the 3.25-year period between when the action was commenced and when the notice of motion was served for this hearing.

[33] Mr. Subramaniam also argues that the Court has inherent jurisdiction to dismiss an action for delay. As an associate judge, I do not have inherent jurisdiction and must find authority in a statute.[22] As a result, I am unable to render a decision on this issue and limit the request for dismissal for delay to be under subrule 24.01.

[34] As noted above, the three-part test under subrule 24.01 is conjunctive. As Mr. Subramaniam has failed to establish that there has been inordinate delay in the prosecution of the action, it is not necessary for me to consider the other two branches of the test.

[35] Mr. Subramaniam also argues that a dismissal of the action is warranted under subrule 30.08(2)(b). That subrule provides that an action may be dismissed where a party fails to serve an affidavit of document or produce a document for inspection in compliance with the *Rules*. Mr. Subramaniam alleges that the Plaintiff has failed to satisfy outstanding production requests for documents pertaining to its claim for alleged rent owing and other matters.

[36] Mr. Subramaniam has filed a law clerk affidavit in support of his motion, which says that the Plaintiff served an affidavit of documents and produced documents on November 21, 2023, and a supplementary affidavit of documents on July 30, 2025.

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[19] *Humphreys v. Trebilcock*, 2017 ABCA 116, para. 123.
[20] *Ibid.*, para. 3.
[21] *Deutsche Postbank AG v. Kosmayer*, 2019 ONSC 6997, para. 1.
[22] *D'Eon v. Hosseini*, 2021 ONSC 7560, para. 76.

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[37] Mr. Subramaniam also says that the Plaintiff has breached a discovery plan that was ordered on consent pursuant to the Order of Associate Justice Jolley dated January 17, 2025, and that the action may be dismissed under subrule 60.12(b) for failure to satisfy an interlocutory order.

[38] Neither of these subrules were referred to in Mr. Subramaniam's notice of motion dated September 17, 2025. There were included in an amended notice of motion that was served on May 28, 2026, less than three weeks prior to the hearing of the motion.

[39] Mr. Subramaniam's factum did not set out the applicable test for striking a pleading under subrule 30.08(2) and did not address how an order striking the pleading was warranted in this case through the application of the facts to the law. These matters were also not addressed in oral submissions.

[40] As noted above, the Plaintiff has filed affidavits of documents in this proceeding. Mr. Subramaniam has not brought a motion under subrule 30.06 for an order for a further and better affidavit of documents or for an order for disclosure of production for inspection of a document.

[41] I am not prepared to dismiss the action on the basis that the Plaintiff has failed in its discovery obligations, as there has been no determination made by the Court that the Plaintiff in fact breached its obligations under the *Rules* or the discovery plan.

[42] For the reasons set out above, Mr. Subramaniam's motion for an order dismissing the action for delay is hereby dismissed.

[43] I strongly urge the parties to come to a resolution on costs. If they are unable to do so, they may contact my Assistant Trial Coordinator to receive my direction as to the exchange of written cost submissions.

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Associate Justice Rappos

DATE: November 12, 2026

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