

CITATION: Bradley Court Limited v. Tinkasimire, 2023 ONSC 972
COURT FILE NO.: CV-21-667587
DATE: 2023 02 08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BRADLEY COURT LIMITED, *Plaintiff*
- and -
CHRISTOPHER TINKASIMIRE, *Defendant*

BEFORE: Associate Justice Todd Robinson

APPEARING: C. Tinkasimire, *in person (moving party)*
B. Flanagan, *counsel for the plaintiff (responding party)*

HEARD: October 14, 2022 (by videoconference)

REASONS FOR DECISION
(Motion to dismiss for delay)

[1] Christopher Tinkasimire moves for an order dismissing this action by Bradley Court Limited (“Bradley Ltd.”) for delay on the basis that Bradley Ltd. has failed to set this action down for trial within six months of the close of pleadings, contrary to subrule 24.01(1)(c) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the “*Rules*”).

[2] I am dismissing the motion. Although I appreciate Mr. Tinkasimire’s frustration with what appears to have been a breakdown in communication over the discovery plan, this is not a case where the plaintiff has demonstrated disdain for the court and its processes, where there has been inordinate or inexcusable delay, or where the record before me supports that delay has created a serious risk to a fair trial.

ANALYSIS

[3] Subrule 24.01(1)(c) of the *Rules* permits a defendant who is not in default under the *Rules* or an order of the court to move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings. No challenge was raised to Mr. Tinkasimire’s compliance with the *Rules* or standing to bring the motion. It is undisputed that pleadings in this action were closed in September 2021.

[4] Granting an order dismissing an action for delay under rule 24.01 is discretionary. It is available in two circumstances. The first is where the delay is caused by the intentional conduct

of the plaintiff or its counsel that demonstrates a disdain or disrespect for the court process. The second is where the moving defendant shows that the delay is inordinate, inexcusable, and gives rise to a substantial risk that a fair trial of the issues will not be possible because of the delay. *Langenecker v. Sauv *, 2011 ONCA 803 at paras. 6-12; *Sickinger v. Krek*, 2016 ONCA 459 at para. 29-31.

[5] There is no evidence of intentional or contumelious delay on the part of Bradley Ltd., and certainly not conduct demonstrating a disdain or disrespect for the court process. That leaves only the second branch of dismissal for delay.

[6] In deciding whether delay is “inordinate”, the court measures the time from the commencement of the proceeding to the motion to dismiss, but remembering that some cases move more slowly than other because of the issues raised, the parties involved, and the nature of the action: *Sickinger v. Krek*, *supra* at para. 30.

[7] With respect to “inexcusable” delay, the court must consider the reasons offered for the delay and whether those reasons provide an adequate explanation, with regard to the credibility of the explanations, the explanations for individual parts of the delay, the overall delay and the effect of the explanations considered as a whole: *Sickinger v. Krek*, *supra* at para. 30. An explanation that is “reasonable and cogent” or “sensible and persuasive” will typically excuse delay, at least to the extent that an order dismissing the action is inappropriate: *Wang v. Wu*, 2019 ONSC 3736 at para. 16.

[8] There is no inordinate or inexcusable delay here. The procedural history in this action shows consistent movement since the close of pleadings, albeit that much of that movement has been tied up in disputes over a discovery plan and competing motions. Bradley Ltd. has provided a more than adequate explanation for the “delay” between the action being commenced in August 2021 and this motion being brought some 11 months later, which has evidently been contributed to by the positions taken by Mr. Tinkasimire.

[9] As noted, pleadings were closed in September 2021. Settlement discussions followed the close of pleadings and then, between November 2021 and April 2022, the parties were back and forth over the terms of a discovery plan. Bradley Ltd. ultimately sought to move forward with discoveries, but Mr. Tinkasimire refused to do so without an agreed discovery plan.

[10] Amidst that dispute, Bradley Ltd.’s sworn affidavit of documents was served in February 2022. Mr. Tinkasimire confirmed he would not accept it without an agreed written discovery plan. A further discovery plan was subsequently proposed by Mr. Tinkasimire, in which Mr. Tinkasimire sought examination rights against multiple individuals, including some do not appear to be employees of Bradley Ltd., and proposed written interrogatories in lieu of oral examinations. Bradley Ltd. did not agree to the discovery plan, which appears to have been based on objections to those terms. Mr. Tinkasimire thereafter confirmed by email that he would move forward with the discovery process without an agreed discovery plan and served his own sworn affidavit of documents in May 2022.

[11] Between June 2022 and August 2022, the parties were embroiled in motion scheduling disputes. Bradley Ltd. sought to bring a motion to strike Mr. Tinkasimire's defence, which was ultimately booked for March 2023, with materials served in August 2022. Mr. Tinkasimire pursued this motion, including arranging an appearance in Civil Practice Court and attending without notice to Bradley Ltd.

[12] In my view, this is not a situation where the delay is inordinate or inexcusable. Neither party was agreeable to terms included in the discovery plan proposed by the other. Bradley Ltd.'s failure to agree to Mr. Tinkasimire's requested terms was not unreasonable. Affidavits of documents have nevertheless been exchanged. Bradley Ltd. sought to proceed with examinations for discovery, but Mr. Tinkasimire did not agree to proceed with them. Competing motions were then addressed.

[13] Although not necessary to my disposition of this motion, I would in any event have found that there is no evidence supporting any risk that a fair trial is not possible. There is a presumption of prejudice from delay, the strength of which increases over time. However, in my view, presumptive prejudice is not strong in this case. It is also rebutted by the undisputed evidence from Bradley Ltd.'s former lawyer that he is unaware of any potential witnesses dying or otherwise being incapable of providing evidence at trial or of any relevant records being lost or destroyed.

[14] Mr. Tinkasimire has put forward no cogent evidence of case-specific or actual prejudice to his ability to fairly defend the action. He asserts that three relevant witnesses are no longer available, namely a security guard, the property manager, and the superintendent. There is no evidence supporting that assertion in the record before me. Further, there is nothing supporting that they cannot be located and are unable to testify. Mr. Tinkasimire asserts that the superintendent no longer resides in Canada, but that is not an insurmountable obstacle. For example, remote witness testimony by videoconference is an option at trial.

[15] Dismissing an action for delay is a severe remedy. Since there is no intentional or contumelious delay and the delay to this point is not inordinate, inexcusable, and will not give rise to any substantial risk that a fair trial is not possible, there is no basis on which to dismiss this action.

DISPOSITION

[16] For the above reasons, Mr. Tinkasimire's motion is dismissed.

COSTS

[17] Bradley Ltd. has been completely successful in opposing the motion. It seeks its costs of \$5,447.50, including HST and disbursements, on a partial indemnity basis. The claimed costs are reasonable and proportionate to the seriousness of the relief sought by Mr. Tinkasimire. Mr. Tinkasimire did not challenge Bradley Ltd.'s costs claim. Rather, he submitted that, if he was unsuccessful, any costs award should not be payable until after trial due to his current financial situation.

[18] Costs ordinarily follow the event. Mr. Tinkasimire has not convinced me that his personal circumstances, for which I have no evidence, should shield him from the ordinary costs consequences of bringing an unsuccessful motion in ongoing litigation. I am prepared to afford him some latitude in the timing of payment, but not until the end of trial.

[19] For these reasons, I fix costs of the motion in the amount of \$5,447.50, including HST and disbursements, payable by Mr. Tinkasimire to Bradley Ltd. within sixty (60) days. Order accordingly.



ASSOCIATE JUSTICE TODD ROBINSON

DATE: February 8, 2023