

CITATION: Kalanda v. Parker, 2015 ONSC 4367
COURT FILE NO.: CV-08-365182
MOTION HEARD: May 6, 2015

SUPERIOR COURT OF JUSTICE – ONTARIO

Re: JOHN KALANDA LIMITED, BRIAN DOUGLAS KALANDA
JOHN MARTIN KALANDA, and ROSS ALLAN KALANDA

Plaintiffs

v.

JAMES H. PARKER, DION WALTON, PARKER'S CLEANERS,
PARKER'S CLEANERS (BURLINGTON) LTD.,
JAMES H. PARKER LTD. and 1615256 ONTARIO LIMITED

Defendants

BEFORE: Master Lou Ann M. Pope

APPEARANCES: Jason Beitchman, Reuter Scargall Bennett LLP, for moving
plaintiffs

Fax: 416-869-3411

Shobita Ravindren, James Cimba Professional Corporation,
for defendants, Dion Walton and Parker's Cleaners
(Burlington) Ltd.

Fax: 905-522-4369

James Page, Martin & Hillyer Associates, for defendant,
James H. Parker

Fax: 905-637-5404

REASONS FOR ENDORSEMENT

- [1] The plaintiffs seek to set aside the Registrar's order dismissing this action for delay, dated July 15, 2014, pursuant to rule 48.14(1).
- [2] The plaintiffs are brothers who are the registered owners of 480 Guelph Line in Burlington, Ontario which is commercial property. They lease the property to the defendants, Dion Walton ("Walton") and Parker's Cleaners (Burlington) Ltd. ("Parker's Cleaners") (collectively "the Parker's Cleaners defendants"). Parker's Cleaners is the legal entity arising out the amalgamation of James H. Parker Ltd. and 1615256 Ontario Limited. Parker's Cleaners operated as a dry cleaning business from 1960 to 2004 by the defendant, James H. Parker ("Jim Parker"), who sold the business to the current tenants.
- [3] This action arises out of the alleged contamination by the defendants and their dry cleaning operations. The action was commenced in October 2008 and is related to an action commenced by a neighbouring property owner in which the parties to this action are co-defendants. (Holubek et al v. Kalanda et al, Court File No. CV-06-318720 "the Holubek action") The Holubek action arises out of the same alleged occurrences of contamination as this action.
- [4] In early 2009, the plaintiffs herein ("Kalandas") asserted crossclaims in the Holubek action against their co-defendants and tenants that are substantially identical to the allegations in the statement of claim herein.
- [5] There is also a third and related action commenced by another property owner. (Easterbrook v. John Kalanda Limited et al. Court File No. 11-24660 (Hamilton)) In addition, it appears from the evidence that there are two additional claims made by "downstream neighbours." (Affidavit of Brian Douglas Kalanda sworn January 7, 2015, para. 7)
- [6] The Holubek action is scheduled for trial to commence on November 23, 2015. The plaintiffs state that it is their intention that this action will be consolidated with the Holubek action. This point will be addressed later.

Litigation History

October 29, 2008	Notice of Action issued
November 28, 2008	Statement of Claim issued

(Jan./09 – Kalandas deliver statement of defence and crossclaims in Holubek action)

February 27, 2009	Notice of Intent To Defend delivered by Dion Walton and Parker's Cleaners (Burlington) Ltd.
March 23, 2009	Plaintiffs waive statement of defence by Parker's Cleaners until further notice
February 28, 2011	Status Notice issued (rule 48.14(1))
July 8, 2011	Status Hearing; Master Haberman's Status Hearing Order made on consent ordering extended timelines:
	Discoveries by December 31, 2013
	Discovery motions by February 8, 2014
	Mediation by April 8, 2014
	Set down for trial by July 8, 2014
February 20, 2013	Statement of Defence delivered by James H. Parker
<i>(July, 2013 – scheduling of Holubek trial)</i>	
July 15, 2014	Registrar's Order dismissing action for delay – Rule 48.14(1)
July 24, 2014	Plaintiffs file motion record for herein motion
November 25, 2014	Motion adjourned by Master Haberman to January 8, 2015 for 10 minutes; no responding material was filed
January 8, 2015	Master Dash adjourned this motion to May 6, 2015 for argument for 85 minutes as responding material had been filed; order that costs of that day reserved to hearing of motion

(November 23, 2014 – Holubek action scheduled to commence trial)

Status of Action

- [7] This action is at the pleadings stage. In fact, pleadings are not complete as the plaintiffs have not requested that defendants, Walton and Parker's Cleaners, deliver their statements of defence. They were granted a waiver on March 23, 2009. Examinations for discovery have not been held in this action; however, the plaintiffs contend that discoveries of the Kalandas and the defendants herein were completed in the Holubek action. Affidavits of documents have not been delivered by any party in this action. Mediation has not been held in this action.
- [8] A status notice was issued by the registrar on February 28, 2011. The plaintiffs requested a status hearing which resulted in a consent order at the status hearing on July 8, 2011 extending timelines as set out in the litigation history above. The action was to be set down for trial by July 8, 2014. As it was not, the registrar dismissed the action for delay by order dated July 15, 2014.

Law

- [9] Prior to the amendments to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that took effect January 1, 2015, Rule 48.14(5) provided that the registrar shall dismiss an action for delay if an action is not set down for trial, restored to a trial list or terminated by any means within the time specified in an order made at a status hearing. As the dismissal order herein was made on July 15, 2014, prior to the amendments, Rule 48.14(5), as it read prior to the amendments, applies to this action.
- [10] Subrule 48.14(16), as it existed prior to the amendments, applies to this motion. It provides that an order under rule 48 dismissing an action may be set aside under rule 37.14.
- [11] Rule 37.14(1) provides that a party who is affected by an order of a registrar may move to set aside the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. The court has discretion to set aside the order on such terms as are just. (subrule (2))

Test to Set Aside Registrar's Dismissal Order

- [12] The plaintiffs have the onus to satisfy the court that this action should be permitted to proceed.

- [13] The court will consider the following four factors while taking a contextual approach in order to achieve a result that is just in all the circumstances. It is not necessary for the plaintiffs to satisfy each of the four factors in order to have the order set aside. (*Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80 (Ont. Master), *Finlay v. Van Paassen*, 2010 ONCA 204, 2010 CarswellOnt 1543 (CA), at paras 27-29)
- a. Explanation for the litigation delay;
 - b. Inadvertence in missing the deadline;
 - c. Promptness in bringing the motion to set aside;
 - d. Prejudice to the defendants.

Explanation for the Litigation Delay

- [14] It is the plaintiff's position that there has been no unreasonable or intentional delay in this action. It is undisputed that prior to the dismissal order, the parties had been cooperating to remediate the environmental contamination at the subject property to reduce the amount of damages at issue at trial. The plaintiffs state that in order to minimize legal costs for all parties and to avoid unnecessary duplication, and knowing this action would be consolidated with the Holubek action, significant steps have been taken to advance the Holubek action as it is scheduled for trial in November 2015.
- [15] The plaintiffs also contend that there has been a shared desire to minimize legal costs pending remediation of the lands. In that respect, they argue that the defendants' actions are relevant and ought to be taken into consideration in determining whether there has been unreasonable delay.
- [16] The evidence of Brian Kalanda is that examinations for discovery, although not being held in this action, were conducted in the Holubek action which he attended personally and watched as both Jim Parker and Walton were examined. He further states that he and his brothers face personal liability for the costs of cleanup of their property and possible personal bankruptcy, as result of the carelessness of the defendants, the Holubek action and three other actions.
- [17] Walton's evidence is that he consented to the status hearing timetable on April 21, 2011 on the basis that the timetable would be followed; however, none of the steps have been completed. I am not convinced that his

evidence is completely accurate. The exhibits attached to his affidavit reveal that prior to the status hearing in July 2011, all parties consented to have the action continue and that it be heard at the same time or immediately after the crossclaim by the Kalandas in the Holubek action. (Exhibit “C” to his affidavit sworn January 5, 2015, being the Status Hearing Request Form dated May 24, 2011) That form also indicated that this action could not be listed for trial because the Holubek action was struck from the trial list at the pre-trial conference pending motions to consolidate, service of expert reports and other matters. However, Master Haberman was not prepared to sign the proposed order as it did not provide for a future set down date for this action. This is confirmed by plaintiffs’ counsel’s email of July 8, 2011 to opposing counsel in which Mr. Weintraub stated:

After hearing about the status of this matter and the findings of Justice Corrick in the Holubek action, she advised that she would give us as much time as we needed. Accordingly, I proposed a timetable which Master Haberman accepted, . . . The schedule which was imposed is as follows: . . .” (Exhibit “H” to Affidavit of Dion Walton sworn January 5, 2015)

- [18] The schedule referred to above is as set out in the paragraphs under heading “Litigation History” for July 8, 2011.
- [19] The evidence is clear that none of the parties took any steps to conduct discoveries or mediation. It is obvious that the court-imposed timetable was made on the insistence of Master Haberman over the parties’ joint proposal that there be no new set down date and that the action be allowed to continue indefinitely or until it was tried with the Holubek action.
- [20] In my view, the plaintiffs have not explained adequately the delay in this action. They have attempted to explain why discoveries have not been held – to save costs and conduct discoveries in the Holubek action only as the issues are the same – however, this begs the question that if the issues are essentially the same in both actions, and the plaintiffs have delivered a cross-claim against their co-defendants in the Holubek action, why has this action continued and why ought it be permitted to continue. This action is still at the pleadings stage. While I accept there is ample evidence that it was the plaintiffs’ intention to have this action consolidated with the Holubek action, a consolidation motion had not been brought by the time this action was dismissed in July 2014 despite the statement in the Status

Hearing Request Form in May 2011 that the Holubek action was struck from the trial list at the pre-trial conference “pending motions to consolidate”. Clearly there was no pending consolidation motion at that time, nor has there been one since then and up to the time of the dismissal. Furthermore, and of particular importance, is that there is no evidence that any party was in the process of bringing such a motion. This is particularly troublesome because the Holubek action was scheduled for trial in July 2013 and there is no evidence that at that time there was any mention to the court that either the Holubek action was being scheduled along with this action, or that there would be a consolidation motion such that the Holubek action would be the trial of both actions as consolidated.

- [21] In conclusion on this factor, I conclude that the plaintiffs have not explained adequately the litigation delay.

Inadvertence in Missing the Deadline

- [22] The plaintiffs assert that their counsel inadvertently missed the deadline to set the action down for trial, which he had diarized, as he was attending to remediation of the subject property and coordinating expert reports.
- [23] Parker’s Cleaners submit that plaintiffs’ counsel missed the deadline intentionally because the plaintiffs had also missed the remaining deadlines to conduct discoveries, discovery motions and mediation. These defendants argue that the plaintiffs ignored a previous lifeline granted to them at the status hearing which allowed them to continue the action on the basis of the timelines ordered. These defendants point out that the plaintiffs have not requested a statement of defence from them since March 5, 2009 when plaintiffs’ counsel indicated that a statement of defence would not be required until further notice.
- [24] The plaintiffs’ evidence fails to explain how this action could be set down for trial by the deadline when none of the steps in the status hearing timetable had been completed, nor were pleadings closed.
- [25] In my view, plaintiffs’ explanation in missing the deadline is inconceivable.

Promptness in Bringing Motion

- [26] There is no dispute that plaintiffs’ counsel acted promptly in bringing this motion. Further, the two adjournments are explained adequately.

Prejudice to the Defendants

- [27] The Parker's Cleaners defendants submit that they will be prejudiced if the action is permitted to proceed given the death of two witnesses. Firstly, James Parker's spouse, Garnet Parker, died in March 2009. The Executrix of Garnet Parker's estate is seriously ill requiring surgery. Walton's evidence is that the Estate of Garnet Parker is a defendant in the Holubek action. This statement is inaccurate as Garnet Parker's estate is not a named party in the Holubek action. In addition, it is not Walton's evidence that Garnet Parker would have been a witness at trial.
- [28] Secondly, Parker's Cleaners contend that they will be prejudiced because Walton's former counsel, Colin Rayner, who would likely have been a witness at trial, died on February 26, 2010. Mr. Rayner acted for Walton when he purchased the dry cleaning business from Jim Parker in 2004; and he prepared the environmental indemnity from Jim Parker to Walton. Notably, Parker Cleaner's statement of defence to the cross-claim of the Kalandas, pled that James Parker agreed to retain responsibility and to indemnify them as purchasers of the dry cleaning business in respect of historical contamination; however, it further states that they have no knowledge of the specific terms and conditions of the agreement between Jim Parker, Walton and any other parties to the agreement. (Amended Statement of Defence and Crossclaim of the Kalandas, para. 24 of Crossclaim, and Statement of Defence of the Parker's Cleaners Statement of Defence to the Crossclaim of the Kalandas, para. 2) Although it is not clear from the evidence, it appears that the said indemnification agreement has not been located and produced, or it was drafted but not signed by all parties, and; therefore, these defendants may have intended to call Mr. Rayner as a witness at trial regarding the evidence surrounding the alleged agreement.
- [29] Parker's Cleaners also submit that prejudice can be inferred by the extensive passage of time and the presumption that memories fade as time passes.
- [30] Jim Parker's evidence is that he is 89 years of age, he is not well and struggles with serious health issues. He has no assets but resides in his deceased's wife home with permission of the executrix and daughter of his late wife's estate. Similar to Walton's evidence, Jim Parker states that his late wife's estate is a defendant in "concurrent litigation" and that the administration of her estate has been held up pending determination of this

litigation. Having reviewed the plaintiffs' pleadings brief, which includes copies of all pleadings in this action, the Holubek and the Easterbrook actions, Garnet Parker's estate is not a party to any of these actions. It is possible that Garnet Parker was a shareholder of one of the defendant corporations, although not pled, nor is it the evidence on this motion. If that is the case, her estate would also be involved in the related actions. Thus it could not be said that this action only is holding up the administration of her estate. It is Jim Parker's evidence that his late wife would have been an "important witness" for him; however, he fails to state the reason why she would be an "important witness." Jim Parker further states that he intends on bringing a summary judgment motion in this and all companion actions once they are consolidated based on "at the very least my corporate shield defence". (para. 10 of his Affidavit)

- [31] The plaintiffs have the onus to demonstrate that the defendants will suffer no prejudice if the action is allowed to proceed.
- [32] An action may be dismissed even in the absence of prejudice (*1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67 (Ont. C.A.), at para. 32), although in most cases, the question of prejudice is a key consideration in determining whether to set aside a dismissal for delay. (*MDM Plastics Ltd., Vincor International Inc.*, 2015 ONCA 28, 2015 CarswellOnt 602, at para. 24)
- [33] The prejudice that must be considered is regarding the defendant's ability to defend the action that would arise from steps taken following dismissal, or which would result from restoration of the action following the registrar's dismissal. (*MDM*, supra., at para. 25; *806480 Ontario Ltd. v. RNG Equipment Inc.*, 2014 ONCA 488, [2014] O.J. No. 2979 (Ont. C.A.), at para. 4)
- [34] In considering what prejudice may arise from the decision to reinstate the action, the court must balance two competing principles: (1) the finality principle, which considers the prejudice to the defendant resulting from having the case restored after being dismissed; and (2) the principle that the action should be determined on the merits. (*MDM*, supra., at para. 27)
- [35] In my view, the prejudice raised by the defendants regarding the inability to call witnesses due to their deaths, cannot be relied on because their deaths occurred prior to the dismissal order of July 15, 2014, and notably before the status hearing order of July 8, 2011 when the defendants consented to the action continuing without a set down date. The alleged

prejudice to them due to the deaths and the lost evidence existed in July 2011 yet they consented to the action continuing. The Ontario Court of Appeal has repeatedly affirmed that the prejudice to be considered must arise from steps taken following dismissal or which would result from restoration of the action following the dismissal. As recently stated by the Court of Appeal in *MDM*, supra., at paras 38-39:

The defendant could not be said to have gained any security of legal position through the dismissal order given that the plaintiff immediately made it known to the defendant that it wished to have the order set aside and promptly brought the motion to set aside the dismissal.

. . . the defendant's interest in finality was not engaged in the circumstances of this case, because the plaintiff acted promptly in seeking to set aside the second dismissal order.

- [36] Regarding the alleged prejudice with the passage of time, Cronk J.A. explained in *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 102 O.R. (3d) 555, at para. 60, that the expiry of a limitation period “can give rise to some presumptive prejudice, the strength of which increases with the passage of time”.
- [37] Parker's Cleaners did not argue specifically that there is a presumption of prejudice due to the passage of time due to the expiration of the limitation period. In fact, although only one statement of defence has been delivered, a limitation defence was not pled by Jim Parker.
- [38] In my view, it would be difficult to conceive any prejudice to the defendants due to the passage of time since this action was commenced for several reasons. Firstly, as stated above, the two potential trial witnesses had passed away prior to the status hearing in July 2011 when the defendants consented to allow this action to proceed. Neither of those potential witnesses had been examined prior to their deaths in order to preserve their evidence. Thus, if the defendants were not prejudiced at that time, it cannot be said that they would be prejudiced if this action is permitted to proceed. Secondly, as this action is based on the allegation of environmental contamination of land, it is logical that the majority of the evidence on liability and damages will be based on experts' opinions and not memories of witnesses. Third, it is not accepted that the administration of Jim Parker's wife's estate has been held up by this litigation as she is not

a party to this action. Therefore, in my view, I find based on all of the circumstances that there is no presumption of prejudice to the defendants.

- [39] In conclusion on the factor of prejudice, the plaintiffs have satisfied their onus to satisfy the court that the defendants would suffer no prejudice if this action were permitted to continue.

Conclusion

- [40] The history of this action involves an unusual set of circumstances. Unusual because the action is still only at the pleadings stage almost seven years from the date it was commenced. One set of defendants has not been asked to deliver a statement of defence. Further, at the status hearing stage in July 2011, all parties agreed, essentially, to leave the case open indefinitely. At that time, there was a consensus to have this action tried at the same time or immediately after the Kalandas' crossclaim in the Holubek action, but not to consolidate. There appears to be a contradiction in the Status Hearing Request Form when the parties seek an order for trial together, yet reference is made to motions to consolidate. Perhaps that is one of the reasons why Master Haberman refused to grant the order. In any event, a motion for trial together nor to consolidate have been brought notwithstanding the knowledge that in July 2013 the Holubek action was scheduled for trial which is to commence in a few months from now. In addition, it is also notable that when the Holubek action was scheduled for trial, there is no reference to or timeline to bring a motion to consolidate. In those circumstances, the plaintiffs' evidence is puzzling when they state that they still intend to bring a consolidation motion.
- [41] Jim Parker's evidence is equally puzzling when he states that he intends on bringing a summary judgment motion in this and all companion actions once they have been consolidated. Frankly, from a practical standpoint, he would likely not have been able to obtain a motion date before the trial date given that he swore his affidavit on January 5, 2015.
- [42] It is also noteworthy that none of the defendants have brought a motion to dismiss this action for delay under rule 24. One possible explanation for not bringing that motion is that they agreed in 2011 to allow the action to continue. It can also be explained by the fact that the parties are well aware that issues in the Holubek action, which are the same issues in this action, will be adjudicated on at the trial late this year.
- [43] That, in my view, is at the heart of the delay in this action.

- [44] It is logical for all the parties herein to await the outcome of the Holubek trial, which, it appears will be determinative of all the issues in this action, at which time the parties can dispose of this action.
- [45] In my view, the plaintiffs' claims have been protected and preserved in their crossclaim against Parker's Cleaners in the Holubek action. The Kalandas' crossclaim is duplicitous of the claim in this action.
- [46] There is no explanation why this action should be allowed to continue when the plaintiffs have the same claims against the same defendants in their crossclaim in the Holubek action. Section 138 of the *Courts of Justice Act*, R.S.O., 1990, c. C.43 discourages multiplicity of proceedings.
- [47] In summary and for the above reasons, the plaintiffs failed to explain the litigation delay and they provided no valid explanation for missing the set down deadline. Further, they have put forth the same claim as in this action in their crossclaim in the Holubek action. Therefore, in my view, it is just in all the circumstances that this action not be allowed to proceed. The plaintiffs' motion is hereby dismissed.

Costs

- [48] Rule 48.14(5) provides that the registrar shall dismiss an action for delay, with costs, if it is not set down for trial within the time specified in an order made at a status hearing.
- [49] Therefore, as the registrar's order has been upheld, the defendants shall be entitled to their costs of this motion and the action.
- [50] The parties did not exchange costs outlines prior to this hearing. After oral submissions on costs of the motion, Jim Parker shall be entitled to costs of the motion fixed in the amount of \$1,500 inclusive of HST, disbursements and the January 8, 2015 appearance at motions court. Costs are payable within 30 days of the date this decision is released.
- [51] Parker's Cleaners shall be entitled to costs of the motion fixed in the amount of \$2,500 inclusive of HST, disbursements and the January 8, 2015 appearance at motions court. Costs are payable within 30 days of the date this decision is released.
- [52] None of the defendants are entitled to costs of the November 20, 2014 appearance at motions court as their counsel did not attend.

- [53] If the parties cannot agree on costs of the action, the defendants shall deliver a bill of costs and written submission of not more than two pages double spaced within seven days of the date this decision is released. The plaintiffs may within a further seven days deliver written responding submissions to the defendants' costs submissions of not more than two pages double spaced.

(original signed)
Lou Ann M. Pope

Date Released: July 8, 2015