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<u>Rule 24.01 Dismissal for Delay Does Not Apply to Lien Actions</u>

Key Takeaway
A motion under Rule 24.01(1)(c) to dismiss an action for delay if the plaintiff has failed to set the action down for trial within six months of close of pleadings will not be successful for lien actions. The Court in *Structured Restoration Inc. v. Chaly*[1] held that the Rule would be contrary to the timelines under the Construction Act, and in the face of such a conflict, the *Construction Act*[2] ("**Act**") governs.

Background:
The plaintiff, Structured Restoration Inc., completed remedial work for the defendant homeowner and was owed $16,273.65. The plaintiff perfected its lien and commenced their action in Ontario's Superior Court.

The defendant brought a separate application challenging the court's jurisdiction, arguing the work was not lienable and the action should have been commenced in Small Claims Court. That application was dismissed but appealed and now sits before the Divisional Court.

The Motion under Rule 24.01:
In parallel to their application, the defendant also brought a motion to dismiss the plaintiff's lien action for delay under Rule 24.01(1)(c) of the *Rules of Civil Procedure* which provides that an action may be dismissed for delay if the plaintiff has failed to set the action down for trial within six months of close of pleadings. They argued the plaintiff was sitting on its hands to create hardship regarding an upcoming mortgage refinancing and property sale.

The test for Rule 24.01(1)(c) requires the defendant to prove that: (i) the default is intentional and contumelious; or (ii) the plaintiff and/or their lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible.

However the facts of this case do not support any of these propositions as the plaintiff was not found in default and there was no inexcusable delay – on the contrary, the defendant's conduct of evading service added to any potential delay and the plaintiff's wait-and-see approach pending the jurisdictional appeal was found to be reasonable and consistent with judicial economy.

Notwithstanding the above analysis, the Court also found that Rule 24.01(1)(c) did not apply to construction lien actions because this Rule conflicts with the Construction Act's own statutory scheme. In particular, the Court relied on *Smith v. Hudson's Bay Company*[3] and *Bernach v. Makepeace*[4] which held that:

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[1] Structured Restoration Inc. v. Chaly, 2026 ONSC 1978.
[2] Section 50(2), Construction Act, R.S.O. 1990, c. C.30.
[3] Smith v. Hudson's Bay Company, 2019 ONSC 2348.
[4] Bernach v. Makepeace, 2021 ONSC 1289.

1. Section 67(3) of the former *Construction Lien Act* (now section 50(2) of the *Act*), provided that the *Rules of Civil Procedure* apply to pleadings and proceedings under the *Act* except where they are inconsistent.
2. Section 37(1) of the *Act* also provides that a lien does not expire until two years after the was action commenced unless either an order for trial has been obtained or the action in which the lien may be enforced has been set down for trial.
3. Therefore, applying Rule 24.01(1)(c) would truncate the legislatively mandated period under the *Act* and the result would be incompatible with the statutory protection afforded to lien claimants.

The Court dismissed the defendant's motion and awarded partial indemnity costs.

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