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Dismissal of a Non-Lien Action Within a Lien Proceeding for Delay May be Harder Than You Think

Key Takeaway

Failure to set a lien matter down for trial within two-years may result in severe cost consequences and a dismissal of the lien action. However, if the lien action contains non-lien claims, such as claims for breach of contract, and, among other things, the plaintiff is able to rebut the presumption of prejudice, these non-lien claims may still survive.

The Background and Decision

On January 19, 2022, the motions judge for the Superior Court rendered its decision for *Whitestone Gate Development Inc. v. Perpetual Succession For East Toronto Chinese Baptist Church*.¹

In April 2018, Whitestone Gate Development Inc. (“**Whitestone**”) which was a self-represented litigant, and an apparently related corporation, G.C International Inc. (“**GC**”), preserved liens totaling approximately \$820,000 lien. Whitestone and GC failed to set the lien action down for trial within two years. The liens were subsequently declared expired and the lien portion of the action was dismissed. In October 2021, Perpetual Succession For East Toronto Chinese Baptist Church (the “**Church**”) then sought to have Whitestone’s remaining breach of contract claim dismissed for delay, pursuant to section 46 of the *Construction Act* (the “**Act**”).

The court found that section 46 of the *Act*, which deals with the expiry of a perfected lien, provides for mandatory dismissal of the action to enforce the lien but not any other causes of action contained within the same lien action. In other words, if an action only sought to enforce a statutory lien remedy, then the entire action may be dismissed pursuant to section 46 of the *Act*. However, if the action includes a separate and properly joined cause of action, such as a breach of contract claim (as was the case here), it is not captured by the mandatory dismissal outlined in section 46 of the *Act*.

Instead, the court found that section 47 of the *Act* was the more appropriate section to consider a dismissal for delay, as it permits a court to dismiss an action in its entirety on “*any proper ground [...] the court considers appropriate*”. The court considered seven principles with respect to dismissal for delay which were detailed in *Szpakowsky v. Tenenbaum*,² a case decided in a non-lien action under Rule 24 of the *Rules of Civil Procedure* (the “**Rules**”), and then outlined the principles as follows:

- (a) Whether the plaintiff’s default was intentional and contumelious, or that the inordinate and inexcusable delay are resulting in a substantial risk to a fair trial;
- (b) whether the plaintiff’s conduct demonstrates a disdain or disrespect for the court process;
- (c) whether the plaintiff is responsible for moving the action forward;
- (d) whether the plaintiff can offer an explanation to rebut the presumptions of prejudice and that the delay was not intentional;
- (e) whether the plaintiff can provide explanations for the delay that are reasonable and cogent, or sensible and persuasive; and,

¹ [2022 ONSC 459](#).

² [2017 ONSC 18](#) at para 19.

- (f) whether the court decides to use its inherent jurisdiction to control its own process, which includes discretionary power to dismiss an action for delay to prevent an abuse of its own process.

Notwithstanding Whitestone's claim of financial issues, unfamiliarity of the legal process, and inability to obtain counsel, the court agreed that many of these factors from *Szpakowsky* favoured dismissing the action for delay, because Whitestone failed to provide adequate reasons for the delay and provided no evidence to rebut the presumption of prejudice. However while the record supported the notion that Whitestone "*ha[d] not been taking pursuit of its claim seriously*", the court nonetheless found that Whitestone could continue its breach of contract claim, because (1) there was no evidence of any actual prejudice (which the court admits Church was not required to provide) and (2) because the Rules had a deadline of five-years for non-lien actions to be ready for trial as opposed to the *Act's* two-year limitation period for lien claims.

As a result, the court dismissed the motion and determined that a dismissal of the 'entire' action would be procedurally unjust if they did not provide Whitestone a final opportunity to proactively advance their "*potentially meritorious (and not insignificant) claim*" which was now subject to a strict timetable. However, this motion was not entirely in Whitestone's favour. Because of Whitestone's approach to the action, the court used its discretion and ordered substantial indemnity costs for this motion.

It begs the question, should Whitestone not have been a self-represented litigant, ignorant of the legal process, and did not have such a significant breach of contract claim – would the court have decided differently and not provided one final opportunity to advance their claim? How long and how many opportunities should these types of parties be given? Perhaps none of these factors matter, so long as the five-year limitation period for non-lien claims do not elapse.



[Jaspal Sangha](#), Associate
T. 647-802-1991
jsangha@margiestrub.com



[Simren Sihota](#), Associate
T. 647-794-1564
ssihota@margiestrub.com