

January 2017

No Avoidance in Delay: A Cautionary Tale for Plaintiffs with Dormant Files

Defendants may take some comfort from the Ontario Court of Appeal's recent decision in *Ticchiarelli v. Ticchiarelli*,¹ which has clarified the law in respect of dismissing an action for delay. Specifically, the Court of Appeal confirmed that even if a defendant takes procedural steps and engages in settlement negotiations, this will not necessarily excuse the plaintiff's delay or save the action from being dismissed.

The action in *Ticchiarelli* involved a dispute over the ownership of shares of a corporation with equity interest in a property development in Windsor, Ontario. The plaintiff alleged that the defendants misused a power of attorney, depriving the plaintiff of repayment of a shareholder loan.

The proceeding was commenced in 2004 and had several periods of inactivity. First, after the plaintiff filed its Affidavit of Documents, the action was dormant for over five years. Then, in 2010, the plaintiff proposed settlement and cross-examined the defendants. The action then fell dormant again between 2010 and 2014, at which time the plaintiff made an offer to settle. By 2015, settlement negotiations failed and the parties agreed to mediation. However, counsel for one of the defendants cancelled the mediation two days before it was scheduled to begin. Shortly thereafter, all but one of the defendants moved to dismiss the action for delay.

¹ *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1.

Over the course of the proceeding, several key witnesses died.

The Court of Appeal upheld the motion judge's decision to dismiss the action on the grounds that there was inordinate and inexcusable delay that prejudiced the defendants. The Court of Appeal confirmed that the motion judge had the grounds to dismiss the action both under Rule 24.01 of the *Rules of Civil Procedure* and also on the basis of the Court's inherent jurisdiction.

The test for dismissal for delay

The Court of Appeal confirmed that an order dismissing an action for delay is justified when the delay is inordinate, inexcusable, and prejudicial to the defendant in that it gives rise to a substantial risk that a fair trial of the issues will not be possible.²

Whether or not the delay is inordinate is measured by reference to the length of time from the commencement of the proceeding to the motion to dismiss.³

Whether the delay is inexcusable requires an examination of the reasons for it and whether they present an explanation that is "reasonable and cogent" or "sensible and persuasive".⁴

Inordinate delay will generate a presumption of prejudice to the defendant.⁵

Considering whether the delay is excused

On appeal, the plaintiff took the position that the motion judge erred in dismissing the action, arguing that the defendants had "excused" the lengthy delays by engaging in procedural steps and settlement negotiations.

The Court of Appeal confirmed that a defendant's participation in certain procedural steps does not necessarily amount to excusing

² *Ticchiarelli* at para. 12.

³ *Ticchiarelli* at para. 15.

⁴ *Ticchiarelli* at para. 16.

⁵ *Ticchiarelli* at para. 28.

a plaintiff's inordinate delay. Notwithstanding that the defendants in *Ticchiarelli* served affidavit materials, attended cross-examinations, cooperated in scheduling a motion, engaged in settlement discussions, and agreed to mediate the dispute, the Court of Appeal upheld the motion judge's finding that the defendants had not excused the delay.

According to the Court of Appeal, the individual procedural steps that the defendants took were relevant, but were to be considered as part of an assessment of the delay in its global context.⁶ A defendant's procedural activity that is merely a reaction to the plaintiff's own procedural steps is not the kind of cooperative step that might excuse a plaintiff's delay.⁷

The defendant's responsibility for delay

The plaintiff also argued that the defendants themselves were responsible for at least some of the delay in the proceeding. The Court of Appeal confirmed that the defendants' failure to move the matter along was immaterial to the consideration of whether to dismiss the action for delay; it is up to the plaintiff to move the proceeding ahead.⁸

The presumption of prejudice

The Court of Appeal held that the motion judge did not err by applying the presumption of prejudice rather than considering whether there was in fact any prejudice to the defendants. While evidence of the defendants' actions may rebut the presumption of prejudice, this does not mean the presumption does not exist, and the burden lies on the plaintiff to displace it. A delay of 11 years from the start of the proceeding until the motion to dismiss mandated a heavy onus of rebuttal.⁹

The plaintiff also had to contend with the fact that several important witnesses died over the course of the proceeding and

⁶ *Ticchiarelli* at para. 20.

⁷ *Ticchiarelli* at para 22.

⁸ *Ticchiarelli* at para. 27.

⁹ *Ticchiarelli* at para. 32.

that the passage of time would make the testimony of surviving witnesses less reliable.¹⁰ Given the nature of the plaintiff's allegations in the action, this was of particular concern: the plaintiff alleged conspiracy, misrepresentation, and undue influence and the Court of Appeal noted that all these allegations succeed or fail largely on *viva voce* evidence at trial.¹¹ In these circumstances, the Court of Appeal upheld the motion judge's finding that the plaintiff had not rebutted presumption of prejudice.

Conclusion

Ticchiarelli confirms the law in respect of dismissing an action for delay in Ontario and offers a warning to plaintiffs: the fact that a defendant takes procedural steps in an action and engages in settlement discussions does not protect the plaintiff from having its dormant action dismissed for delay. In order for the plaintiff's delay to be excused, the defendants' procedural steps must be cooperative in nature and not merely a reaction to the plaintiff's own activity in the action. When it comes down to it, it is up to the plaintiff to move the matter along and failure to do so could result in a dismissal.

by Cara Zacks

For more information please contact:

Toronto Cara Zacks 416.865.7144 cara.zacks@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2017

¹⁰ *Ticchiarelli* at para. 36.

¹¹ *Ticchiarelli* at para. 33.