

2017 ONSC 189
Ontario Superior Court of Justice (Divisional Court)

Mikal-Calladan Construction Ltd. v. Kim

2017 CarswellOnt 209, 2017 ONSC 189, 275 A.C.W.S. (3d) 69

**MIKAL-CALLADAN CONSTRUCTION LTD. and UNIMAC GROUP LTD.
(Plaintiffs / Appellants) and LAWRENCE KIM, VIVIAN RHEE, RICHARD
YOON, JOHN YOON, and STEVE YU (Defendants / Respondents)**

Swinton J.

Heard: January 9, 2017

Judgment: January 9, 2017

Docket: Toronto 275/16

Counsel: Justin P. Baichoo, for Plaintiffs, Appellants

Bruce G. McEachern, for Respondents, Vivian Rhee, Lawrence Kim, and Steven Yu

Peter J. Mitchell, for Respondent, Richard Yoon

Matthew R. Harris, for Respondent, John Yoon

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by Swinton J.:

Jadid v. Toronto Transit Commission (2016), 2016 ONCA 936, 2016 CarswellOnt 19661 (Ont. C.A.) — followed
Reid v. Dow Corning Corp. (2001), 2001 CarswellOnt 2213, 11 C.P.C. (5th) 80, [2001] O.T.C. 459 (Ont. Master) — followed

1196158 Ontario Inc. v. 6274013 Canada Ltd. (2012), 2012 ONCA 544, 2012 CarswellOnt 10154, 295 O.A.C. 244, 112 O.R. (3d) 67, 353 D.L.R. (4th) 129 (Ont. C.A.) — followed

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 48.14 — considered

APPEAL by plaintiffs from decision of master dismissing plaintiffs' motion to set aside order of registrar dismissing their action for delay; APPEAL by plaintiffs concerning costs.

Swinton J.:

1 The appellants appeal the order of Master Mills dated May 30, 2016 in which she dismissed their motion to set aside the order of the Registrar dismissing their action for delay.

2 This action began in October 2011, arising out of a dispute concerning a construction contract with a corporation, Rose of Sharon (Ontario) Retirement Community. That corporation is the subject of an ongoing receivership order. The respondents are former directors of the corporation and were sued for alleged breach of the trust provisions in the *Construction Lien Act*. Pleadings closed around February or March 2012.

3 A status hearing was held on May 22, 2014, at which Master Abrams refused to dismiss the action. Instead, she set a timetable for the exchange of affidavits of documents, discoveries, and mediation. She ordered the Registrar to dismiss the action for delay if the action was not set down for trial by October 31, 2015.

4 Only one respondent John Yoon provided an affidavit of documents in accordance with the timetable. There had been no discoveries or mediation held or scheduled when the Registrar dismissed the action on November 6, 2015 because the action had not been set down for trial.

5 The decision of the Master was discretionary and is entitled to deference. An appellate court should not interfere with such an exercise of discretion unless there has been an error in the legal principles applied or a palpable and overriding error of fact (see *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 (Ont. C.A.) at para. 16)

6 The Master set out the correct test to be applied in deciding whether to set aside a dismissal for delay, relying on *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80 (Ont. Master). She considered the four factors set out in that test, as well as the overall justice of allowing the action to continue.

7 The appellants take issue with the weight she accorded to the factors in the *Reid* test. In particular, they argue that she should have given greater weight to the fact that there was no prejudice to the respondents.

8 They also argue that she erred in failing to consider the ongoing impact of the receivership order and in failing to accept that counsel inadvertently missed the deadline because of a mistake interpretation of the amended Rule 48.14.

9 The fact that there was no actual prejudice to the respondents does not take priority over the other factors (see *Jadid v. Toronto Transit Commission*, 2016 ONCA 936 (Ont. C.A.) at para. 12; *1196158 Ontario Inc.* above at paras. 32-34).

10 The Master was not satisfied with the appellants' explanation for the delay and for their failure to comply with Master Abram's order. She reasonably concluded that the appellants had not provided a satisfactory explanation for the delay. Even though several of the respondents failed to provide their affidavits of documents in accordance with the timetable, the appellants took no steps to communicate with respondents' counsel and made no efforts to try to move the litigation along. As plaintiffs, they bore the primary responsibility to move the litigation along.

11 Moreover, the evidence does not show that the ongoing receivership order had an impact on the conduct of this litigation. Junior counsel's affidavit filed on behalf of the appellants states that the receivership continues, but does not explain why or how that justifies the appellants' inability to move the action forward. The Master reasonably concluded that there was no satisfactory explanation for the delay in either meeting the court-established timetable or seeking an amendment to it.

12 With respect to the impact of the changes to Rule 48.14, there was no evidence before the Master that the appellants' counsel erroneously relied on a mistaken interpretation of the Rule. The Master had no evidence to find that there was inadvertence in missing the set-down date.

13 In sum, the Master made no error in legal principle nor any palpable and overriding error of fact. She reasonably concluded, on the record before her, that the values of timeliness and efficiency were important considerations. Her decision is consistent with the approach of the Court of Appeal in cases such as *Jadid* and *1196158 Ontario*, cited above.

14 Accordingly, the appeal on the merits is dismissed.

15 On costs, the respondents represented by Mr. McEachern (Kim, Rhee and Yu) agree that the costs order below should be reduced to \$2,650, the amount sought by them before the Master. With respect to the other respondents, the costs of \$3,000 each are disproportional to the amount awarded to Mr. McEachern's clients, especially given their limited role on the motion. The Master gave no explanation for this award of costs. Leave to appeal the costs order is granted, and the costs ordered to Richard Yoon and John Yoon are reduced to \$1,500 each.

COSTS

16 I have endorsed the Appeal Book, Compendium and Exhibit Book as follows: "For oral reasons delivered today, order to go:

(1) The appeal on costs is granted. On consent of respondents Kim, Rhee and Yu, costs below are fixed at \$2,650. Costs to Richard Yoon and John Yoon are fixed at \$1,500 each.

(2) The appeal is otherwise dismissed.

(3) Costs to the respondents fixed as follows, to reflect the larger role played by Mr. McEachern in this appeal,

(i) to Kim, Rhee and Yu, the amount of \$5,200.00;

(ii) to Richard Yoon, \$1,500.00;

(iii) to John Yoon, \$2,000.00 all in.

Appeal on merits dismissed, and appeal on costs allowed.