CITATION: Binnj, et al. v. Filter Group, et al., 2024 ONSC 2105
COURT FILE NO.: CV-17-2756
DATE: 20240410

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Binnj, Inc., Plaintiff/Defendant by Counterclaim (Respondent)

AND:

Filter Group Inc., Operating as Greenlife Water Filtration System, Defendant/Plaintiff by Counterclaim (Moving Party)

BEFORE: Garson J.

COUNSEL: Robert B. Macdonald and Alexander Evangelista Counsel, for the Plaintiff/Defendant by Counterclaim (Respondent)

Joseph N. Blinick and Thomas G. Feore, Counsel, for the Defendant/Plaintiff by Counterclaim (Moving Party)

HEARD: March 27, 2024

ENDORSEMENT

[1] FGI, the moving party, brings a motion under Rule 24 of the *Rules of Civil Procedure* to dismiss the main action brought by Binnj, the responding party, for delay, or in the alternative, to dismiss the action for delay based on an abuse of process and the court's inherent jurisdiction to control the process.

[2] Binnj vigorously opposes the motion arguing that any delay is modest and has not caused any prejudice to FJI.

[3] The sole issue for determination by me is whether the action should be stayed for delay.

[4] It should not.

[5] These reasons explain my decision.

Background and Facts

[6] Binnj creates and manages sales platforms and related web applications.

[7] FGI sells residential water filtration systems and is a subsidiary of Just Energy US.

[8] In March 2014, Binnj CEO Clay Hutcherson and then FGI President Daniel MacDonald met and agreed that Binnj would be hired to develop a mobile platform to streamline and integrate FGI's sales.

[9] After extensive work was performed by Binnj, Mr. MacDonald, on November 10, 2016, told Mr Hutcherson that FGI could no longer afford Binnj. On November 16, 2016, after earlier back and forth between the parties, Mr. MacDonald rejected Mr. Hutcherson's request for payment on several unpaid invoices.

[10] As of March 27, 2017, $334,469.40 of outstanding invoices emailed to counsel for FGI remain unpaid and subject to contractual interest.

[11] Binnj commenced the main action against FGI on December 8, 2017. The action seeks $1,500,000 for breach of contract and unjust enrichment. The Statement of Claim alleged that FGI failed to pay for services rendered by Binnj to develop a custom mobile platform pursuant to a Master Services Agreement and License Agreement entered into between the parties on September 18, 2015 ("MSA").

[12] FGI delivered its Statement of Defence and Counterclaim on January 23, 2018, seeking $200,000 in damages and pleading that Binnj failed to fulfill its obligations under the MSA, counterclaiming against Binnj for damages for breach of contract, negligent misrepresentation, unjust enrichment, and other relief.

[13] A Reply and Defence to Counterclaim was delivered by Binnj on February 12, 2018. A discovery plan was negotiated by the parties between April and June 14, 2018. Affidavits of Documents were exchanged by July 2018. Binnj produced over 280 documents and FGI produced over 1400 documents.

[14] No discoveries took place, even though they were contemplated to be completed by end of September 2018.

[15] In fact, from July 31, 2018, to April 10, 2023, a period of almost five years, nothing happened between the parties or their counsel. Radio silence.

[16] Counsel for Binnj finally broke the silence in April 2023 by advising FGI counsel he now had instructions to proceed to schedule examinations for discovery. FGI responded in May 2023 that it would bring the within motion to dismiss the action for delay.

[17] In October 2018, Just Energy Inc. acquired FGI. In March 2021, Just Energy sought and obtained creditor protection under the *Companies' Creditors Arrangement Act* ("*CCAA*") and later emerged from those protections after reorganization in December 2022. This led to even more turnover in FGI staff.

[18] In an affidavit filed by FGI's current President Ben Seidman, he acknowledges that all relevant non-privileged documents have been produced.

The Law

[19] Rule 24.01(1) permits a defendant to move to have an action dismissed for delay where the plaintiff has failed to set an action down for trial within six months after the close of pleadings.

[20] The parties agree that I am bound by the test set out by the Court of Appeal in *Langenecker v. Sauve*, 2011 ONCA 803, 286 OAC 268, at para. 7. This three-part test requires that I can only dismiss the action for delay if I find the delay to be:

a. Inordinate;

b. Inexcusable; and

c. Prejudicial to the defendant (in that a substantial risk exists that a fair trial on the issues is not possible).

[21] Alternatively, the parties and Rule 24 acknowledge the courts inherent jurisdiction to control its own process which includes dismissing actions for delay.

[22] A rebuttable presumption of prejudice exists where the delay is inordinate. The longer the delay the stronger the presumptive prejudice: *Woodeheath Developments Ltd. v. Goldman* (2003), 66 O.R. (3d) 731 (S.C. Div. Ct.), at para. 4.

[23] The onus rests with the plaintiff to rebut the presumption that there is substantial risk to a fair trial.

[24] Rule 24.01(2) provides that where the action has not been set down for trial by the fifth anniversary of commencement of the action, the court "shall" dismiss the action unless the plaintiff demonstrates doing so would be unjust.

Positions of the Parties

[25] FGI argues that institutional memories have faded with time and with the acrimonious departure of two key employees, no discovery representatives are available. They rely on the principle that disputes must be resolved in a timely fashion to ensure the proper functioning of our civil court system.

[26] While acknowledging that the relief sought is dispositive, they submit that Binnj's complacency over many years can no longer be tolerated.

[27] Simply put, they tell me that Binnj's delay is inordinate, inexcusable, and has caused FGI actual and irreparable prejudice that makes a fair trial impossible.

[28] Binnj counters that dismissal is a drastic remedy to be granted in limited and exceptional circumstances. They rely on a series of e-mails between July 2019 through to July 2021, which they argue demonstrate an intention to pursue the litigation.

[29] Binnj suggests that COVID-19 caused them to reallocate resources towards a single client (deemed an essential service) to survive and avoid layoffs. This pivot of resources denied Binnj capacity to pursue this litigation at that time.

[30] Binnj suggests that, at its core, this is a claim for breach of contract: a documents case where the important documents remain preserved and exchanged between the parties. Simply put, a fair trial remains both possible and desirable.

Discussion

Is Binnj's Delay Inordinate?

[31] Yes. Clearly and plainly so.

[32] The measurement begins with the commencement of the action, December 2017 and runs to the hearing of this motion March 2024: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, 274 A.C.W.S. (3d) 525, at para 12.

[33] Six years and three months. I reject the alternate calculation of two years suggested by Binnj after factoring in their excuses.

[34] Radio silence for more than five years. Unacceptable. During that time Binnj was involved in other litigation and was represented by the same corporate counsel in this matter throughout.

[35] The explanations provided by Binnj for the delay and radio silence rings hollow. Busy, clear intentions and COVID-19 only go so far. Ample time for any step be it a letter, a text, a phone call, or any form of verbal or written communication, particularly for an action that had not advanced to the discovery stage, despite the existence of a September 2018 discovery plan.

[36] The reliance on entries in Mr. Hutcherson's diaries from July 2019 to July 2021 with repeated references to FGI does little to demonstrate to me a clear objective intention to move this proceeding forward.

[37] At its height, these are unconvincing musings. Turning one's mind through entries in a diary hardly constitutes a clear objective intent, through words or gestures, to advance litigation in a meaningful and measurable way. Uncommunicated musings do not constitute a meaningful action to advance the claim or explain to the other party why the claim is being put on hold.

[38] COVID-19 was both unprecedented and unpredictable. Life went on. All businesses were forced to cope and pivot. Some did so. Others not so well. Although this may explain a small fraction of the delay, it falls far short of explaining much of the delay.

Is Binnj's Delay Inexcusable?

[39] Yes.

[40] I need spend little time examining this factor given my earlier comments on the reasons proffered by Binnj for delay.

[41] The reasons offered for the delay are far from adequate. Unreasonable. Bald statements that fall woefully short of justifying radio silence for more than five years.

[42] Binnj's choice to refocus and prioritize was its choice. It knew about the outstanding litigation, was an experienced and somewhat sophisticated litigant, and its decisions to ignore this litigation for more than five years were neither reasonable nor persuasive.

[43] Binnj argues that FGI's similar delay in pursuing its own counterclaim should be factored into my analysis.

[44] I agree. In argument, counsel for FGI conceded that if Binnj's action is dismissed, their counterclaim should also be dismissed.

[45] I will have more to say about the actions of FGI later in my reasons.

Has FGI Suffered Non-Compensable Prejudice That Substantially Puts at Risk Trial Fairness?

[46] There are competing interests at play under this factor. The first, simply put, is a litigant's right to their day in court. The right to be heard and to have their dispute decided on the merits. This explains why the bar for dismissal is high: *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Limited,* 2007 ONCA 695, 87 O.R. (3d) 660.

[47] This right is contrasted with the rebuttable presumption of prejudice under the rules where the delay is longer than five years or otherwise inordinate.

[48] FGI's argument of prejudice is based on the acrimonious departure of its two key executives when the MSA was negotiated: Mr. MacDonald in May 2020 and Todd Burgess in November 2020.

[49] FGI says both men are critical to its defence and, if found, would be hostile and likely uncooperative. Both were and are currently involved in other litigation with Just Energy.

[50] Yet the cross-examinations of the current president of FGI, Mr. Seidman, are telling in this regard. They confirm no efforts to reach out to either since their departure to discuss this case, and no inquiries as to their availability and willingness to testify at a trial. They confirm that Mr Seidman has current contact information for both and has chosen not to recently contact either.

[51] I agree with Binnj that FGI's assessment of both key executives is no more than wishful thinking and speculation. No persuasive or clear evidence before me from either that they would or would not testify. Their efforts to reach out to either can be summed up in one word-nil.

[52] Much of the prejudice alleged by FGI is self-inflicted. When Just Energy acquired FGI, due diligence would have and should have quickly disclosed the presence of the claim. When the departure of the two key executives occurred, Just Energy would have and should have been aware of this pending claim and the need to preserve relevant evidence not already produced.

[53] Simply put, any prejudice beyond that presumed by the delay of time was not caused by Binnj and Binnj should not be solely responsible for this self-imposed prejudice.

[54] I return to Rule 24.01((2), which requires me to dismiss the claim after the expiry of five years unless the plaintiff demonstrates that doing so would be unjust. In this context, unjust means that Binnj demonstrates that a substantial risk exists that a fair trial can be held.

[55] This is a document-laden and document-driven breach of contract case. Substantial disclosure of documents has been made. That evidence is preserved and available for trial. The interpretation of the MSA and its related Schedules, the work done, and the adequacy of the work are what will be the main issues for trial.

[56] I am also not swayed by FGI's argument about the lack of transcripts of the many phone calls and meetings between Mr. MacDonald and Mr. Hutcherson leading up the MSA and shortly thereafter. Nor I am I convinced that mere reference to the existence of these extensive discussions leading up to the MSA prevents FGI from fairly defending this claim.

[57] No evidence is before me that Mr. MacDonald or Mr. Burgess refuses to testify or doesn't recall these discussions. Neither is deceased or incapacitated. Both of their unavailability and hostility are presumed but not demonstrated.

[58] Many of these communications were preserved in emails and form part of the many documents already produced and exchanged. Much of this evidence may likely fall under the heading of parole evidence at the trial.

[59] Any suggested lost or failed memories by Mr. MacDonald are pure speculation. All witnesses are human and are subject to the frailties of memory over time. Reference to those answers by Mr. Hutcherson that he couldn't recall certain discussions again is based on pure speculation that those discussions relate to a triable issue. Both sides will have to endure the frailties of human memory dating back to 2014.

[60] Documents preserved may well be sufficient to refresh memories. The claim of a lack of institutional memory may well be refreshed by the many preserved documents. Summons can be served. Non-parties can be compelled to give evidence.

[61] The record before me satisfies me that FGI accepts that it has produced all of its relevant non-privileged documents.

[62] Binnj played no role in FGI's restructuring or in FGI's parting with former senior employees.

[63] I reject the submission that discovery transcripts would have remedied the problem. Even when things started to turn acrimonious with FGI's two key employees, they did nothing to try and advance this matter or schedule discoveries. As the record before me makes clear, like Binnj, FGI and its counsel stayed silent and took no steps over those same many years.

[64] FGI's arguments for trial unfairness, due to lack of disclosure of stored source code and API's, is neither compelling nor persuasive. In any event, Binnj has already shared or will share this requested information, which likely bears little relevance to the claim.

[65] The concerns raised about the elevated rate of contractual pre-judgment interest (18%) do not constitute non-compensable prejudice.

[66] I pause to return to the issue of FGI's own approach to the litigation. I cannot ignore their strategy. Laissez-faire. Lay in the weeds. No effort to move forward on its own counterclaim. Radio silence.

[67] Although I accept that Binnj, as plaintiff, bears primary responsibility for the progress of the proceedings, FGI's passivity in the face of both inaction by Binnj and its own counterclaim becomes a relevant factor in the analysis: *Beshay v. Labib*, 2024 ONCA 186, at para. 23, *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 29.

[68] Put another way, I have great difficulty permitting FGI to rely on delay that they contributed to in a significant way. They were under a similar responsibility with their counterclaim to move the litigation forward in a timely way. There claim that they have no responsibility whatsoever in these circumstances for the delay is disingenuous and not what the rules were intended to allow.

[69] It is disingenuous for them to argue today that the functionality of the software is now an important issue in the main action while at the same time doing nil to advance their own counterclaim in this regard.

[70] In these circumstances, FGI's failure to come to court with "clean hands" to seek the remedy of dismissal makes me reluctant and unwilling to dismiss this case on the merits. FGI equally ignored the timetable for discoveries and took no steps to capture key witnesses' evidence through discoveries and transcripts.

Conclusion

[71] These are highly fact-driven and discretionary exercises. As earlier mentioned, I must balance the right of a litigant to a hearing on the merits with the competing interest of respect for the rules of procedure and achieving timely and just outcomes for all.

[72] I am mindful that Rules 24 and 48.14 are intended to promote efficiencies and create meaningful timelines. To promote judicial economy. These same rules must also be construed in a way that also ensures a just outcome on the merits.

[73] Although the delays before me can fairly be categorized as both inordinate and inexcusable, the actions of FGI were equally inordinate and inexcusable.

[74] Binnj has successfully rebutted the presumption of prejudice and of a substantial risk that a fair trial cannot be had. They have demonstrated to me that dismissal in these circumstances would be unjust. They have shown me that a fair trial in this action is

possible. They have satisfied me that no actual prejudice has occurred beyond the presumed prejudice that arises from a finding of inordinate and inexcusable delay.

[75] It is trite to observe that few actions get set down within six months after the close of pleadings. That is likely the result of the high bar that must be met to achieve dismissal under Rule 24.01: *Faris v. Eftinovski*, 2013 ONCA 360, 228 A.C.W.S. (3d) 89, at para. 37.

[76] The balance of these competing interests in this case leads me to the conclusion that a just outcome for all parties can only be achieved if the motion for dismissal is dismissed and the matter is allowed to proceed to trial.

[77] In so doing, I conclude that FGI will not suffer actual non-compensable prejudice if the action proceeds to trial in a timely fashion. Binnj has not lost its right to a trial on the merits.

[78] For the above reasons, the motion is dismissed.

[79] Parties are to take immediate steps to agree upon a timetable for identifying steps to be completed, including examinations for discovery and any motions, and the dates by which these next steps shall be completed before the matter can be set down for trial, failing which the matter can be resolved by the court at a conference. For clarity, I am not seized of this matter for this purpose. I urge the parties to get on with things and re-focus their efforts towards a trial.

Costs

[80] FGI's costs outline seeks partial indemnity costs of $27,502.67, inclusive of disbursements and HST. They point to the voluminous evidentiary record (more than 1000 pages of evidence between the parties) and the importance of the issues, given success by them given would have been dispositive of the action.

[81] They rely on *Dang v. Conteh*, 2015 ONSC 8022, at para. 45 ("*Dang*") that in cases of this nature, the price of the indulgence being granted to Binnj is an award of costs to the party that sought unsuccessfully to prevent the indulgence from being made.

[82] Binnj's cost outline seeks partial indemnity costs of $40,242.40, inclusive of disbursements. They also point to the high importance of the relief sought as a justification for the costs sought.

[83] Costs at a partial indemnity scale normally flow to the successful party. Rule 57.01 lists the relevant factors I must consider in exercising my discretion to determine the amount of costs to be paid.

[84] Rather than engage in a mathematical exercise, I intend to fix an award for costs that is fair, balanced, and reasonable.

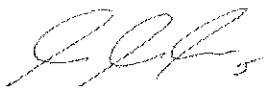
[85] I reject the submission by FGI that even as the unsuccessful party they should recover their costs as the price Binnj must pay for the indulgence. The *Dang* decision filed determined at para 34 that "…most but not all of the blame lies with the plaintiffs". That is distinguishable from the facts before me.

[86] I am not pleased with either party. While Binnj's delay was inordinate and inexcusable, FGI's was no different with regard to their counterclaim and their willingness to lie in wait.

[87] Radio silene by FGI was replaced with a massive motion record with 37 cases attached to their 40-page factum (twice the length permitted by the Practice Direction without leave) and 11 more cases attached to their 11-page reply factum. The evidentiary record filed by both parties was substantial.

[88] In my view, both parties acted unreasonably. This matter should have settled without the motion. The delay since April 10, 2023, to today when Binnj tried to reschedule discoveries was unnecessary and improper. Binnj is also blameworthy and should not be entitled to the normal partial indemnity cost recovery.

[89] Taking into account the relevant factors, I conclude that a reduced costs award of $15,000 payable by FGI to Binnj within 30 days, strikes a fair and reasonable balance in providing some costs to the successful party while at the same time recognizing their contribution to the delay.



Justice M.A. Garson

Date: April 10, 2024