

CASE LAW UPDATE

Nicholas P. Caughey

1351428 Ontario Ltd (Wineyard) et al v 1037598 Ontario Ltd et al

2011 ONSC 4767 (Released August 9, 2011)

Civil Procedure – Restore Action to Trial List – Test for Rule 48.11, *Rules of Civil Procedure*

When a plaintiff seeks leave to restore an action to the trial list under Rule 48.11, the court will consider the same factors as though the defendant moved to dismiss the action for delay under Rule 24.01. A plaintiff in this situation must be prepared to explain any delay in prosecuting the matter and further rebut evidence of actual or presumed prejudice resulting from the delay that may be raised by the defendant.

In this case, the plaintiffs' action was commenced in September 1999, based on allegations stemming from the plaintiffs' purchase of a restaurant, the Wineyard, in or about May 1999. In 2001, the action was struck from the trial list in order for the plaintiffs to add a new defendant. No steps had been taken by the plaintiffs after 2008. The motion to restore the action to the trial list was brought in January 2011.

Rule 48.11 provides discretion to the court to grant leave to restore an action to the trial list. There is scant existing jurisprudence for this Rule. In this case, Justice Backhouse followed Master Graham's recent decision in *Ruggiero v. FN Corp.*, 2011 ONSC 3212, which held that the factors governing the court's discretion are analogous to those governing the court's discretion to dismiss for delay. These are:

- (1) Was the plaintiff's delay intentional and contumelious?
- (2) If not, is there an inordinate and inexcusable delay in the litigation for which the plaintiff or his solicitors are responsible, such as would give rise to a presumption of prejudice?
- (3) If so, has the plaintiff provided evidence to rebut the presumption of prejudice arising from the delays?
- (4) If so, have the defendants provided evidence of actual prejudice?

On the facts, Justice Backhouse found that the plaintiffs had not complied with Rule 24.01(1)(e), requiring the plaintiffs to seek leave to return the action to the trial list within 30 days of it being struck. Justice Backhouse limited the plaintiffs' default, however, as she found that the plaintiffs had not caused inordinate or inexcusable delay, such as would give rise to a presumption of prejudice. Further, she found that there was no evidence that the defendants had suffered actual prejudice and that although the plaintiffs had leisurely prosecuted the action, there was no intentional or contumelious delay. She held that it was significant that the defendants had not moved earlier to dismiss for delay.