

Claims struck for litigants' failure to pay costs (Dunning v. Colliers Macaulay Nicolls; Condoman Developments v. Cannect International Mortgage)

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Perhaps one of the more frustrating aspects of litigation is the inability to collect outstanding funds owing by an adverse party. While there are steps available to enforce monetary judgments after trial, if costs are awarded during an ongoing proceeding, it may seem unfair to allow a party to proceed until costs are paid. Two recent decisions have illustrated that courts may take the severe step of dismissing a party's entire claim if they have refused to pay outstanding costs awards without a valid reason.

Under Rules 57.03(2) and 60.12 of the Ontario *Rules of Civil Procedure*, the court may dismiss or stay a party's proceeding, or make such other order as the court deems just when cost orders are not paid. Several principles are involved in this determination but the court's overriding concern is to ensure the administration of justice, and to uphold the integrity of the justice system: *Apollo Real Estate v. Streambank Funding Inc.*, 2018 ONSC 392 at paragraph 42.

In *Dunning v. Colliers Macaulay Nicolls Inc.*, 2025 ONSC 3561 (CanLII), the Ontario Superior Court of Justice made an order in December 2023 requiring the plaintiff to pay the defendants \$5,086.08 in costs following a motion brought by the defendants to exempt the action from mandatory mediation. In ordering costs on an enhanced scale, the court found that the plaintiff had engaged in reprehensible conduct in her interactions with the court-appointed mediator and had engaged in an abuse of the court's process.

Following the costs order, defendants' counsel wrote to the plaintiff three times seeking payment. The plaintiff did not respond or pay the costs as ordered. The defendants subsequently brought a motion for an order dismissing the action due to the plaintiff's failure to comply with the costs order.

In response to the motion, the plaintiff took the position that she was not required to pay the costs ordered since the costs of all interlocutory steps were reserved to the trial judge. However, no such order had been made. Instead, the plaintiff filed a significant amount of material that was irrelevant to the issues of whether she was required to pay the costs.

The Associate Justice hearing the motion noted that there was no evidence that the plaintiff had demonstrated any intention of paying the costs award, nor had she made any effort to do so. There was no evidence that she was impecunious or otherwise unable to pay the costs order. In fact, there was evidence that she recently travelled to England in order to try to obtain further evidence to support her claim.

The plaintiff's conduct during the hearing of the motion was also frequently abusive. The court noted that she was highly disrespectful of counsel, court staff, numerous judicial officers, and the court generally. When asked to start summarizing her submissions, the plaintiff called the Associate Justice "absolutely asinine" and disconnected herself from the virtual hearing.

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Notwithstanding such conduct, the Associate Justice provided the plaintiff with one final chance to cure her default and ordered her to pay the outstanding costs, along with any further costs ordered for the current motion, within 30 days of the release of the endorsement determining such costs. Whether the plaintiff does so remains to be seen.

The court was less accommodating to the plaintiff in *Condoman Developments v. Connect International Mortgage*, 2025 ONSC 3752 (CanLII). The plaintiff was a real estate developer who had borrowed \$46,000,000 from the defendant, secured by an umbrella mortgage over a number of the plaintiff's properties. After default occurred, the plaintiff attempted to deny the debt and sought an injunction prohibiting the defendant from exercising its rights under the mortgage.

The plaintiff's injunction motion was dismissed. The motion judge described the motion as overblown, costly, and based on little credible evidentiary support. On 16 April 2025, the plaintiff was ordered to pay costs to the defendant in the amount of \$268,500.

By 24 June 2025, the costs had not been paid and the defendant moved to dismiss the action as a result. The defendant argued that since it had already had a prior order for security over the plaintiff's assets in the form of the mortgage at issue, the only meaningful remedy would be the dismissal of the action.

In response, the plaintiff argued that enforcement of the costs order should not proceed because it was seeking leave to appeal the dismissal of the injunction to the Divisional Court. However, the motion judge rejected this argument because the plaintiff had not sought a stay of the costs order pending the appeal. The filing of an appeal does not automatically stay a costs order: *Conti v. Duca*, 2025 ONCA 356, at paragraph 22.

The plaintiff also asserted that it was impecunious and that it was currently impossible to pay the costs. However, the plaintiff did not produce any supporting evidence to establish impecuniosity as required by the applicable law: *Allen v. Kumar*, 2022 ONSC 4223, at paragraph 12.

In the motion judge's view, based on the overall circumstances, the plaintiff already had ample time to pay the costs and its simple refusal to do so was an attempt at rendering the court a paper tiger. The plaintiff's action was therefore dismissed.

Each of the above decisions referred to the principle that courts "must ensure compliance with the orders that are made in the course of litigation because failure to do so is ultimately corrosive of the entire justice system": *Rana v. Unifund Assurance Co.*, 2016 ONSC 2502, at paragraph 2. While the remedy of dismissing a litigant's entire claim is extreme, the decision is generally made only after an assessment of the overall circumstances and consideration of whether a reasonable opportunity to cure the default has been provided and ignored without a valid excuse or explanation. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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