Citation: Forsythe v Castelane et al, 2023 MBCA 97
Date: 20231205

IN THE COURT OF APPEAL OF MANITOBA

Docket: AI23-30-09928
B E T W E E N :

CARRIE LUCE FORSYTHE	)	
	)	
(Plaintiff) Respondent	)	
	)	***W. G. Haight***
- and -	)	*for the Applicants*
	)	*R. C. Castelane,*
RONALD COLESON CASTELANE,	)	*Century 21 Bachman and*
CENTURY 21 BACHMAN AND	)	*Associates, Saramax*
ASSOCIATES, SARAMAX INVESTMENTS	)	*Investments Ltd., Mantin*
LTD., MANTIN CONSULTING INC.,	)	*Consulting Inc., 5887381*
5887381 MANITOBA LTD., RAZELL	)	*Manitoba Ltd., Razell*
INVESTMENTS LTD.	)	*Investments Ltd.*
	)	
(Defendants) Applicants	)	
	)	***K. D. Toyne*** *and*
- and -	)	***M. S. Wire***
	)	*for the Applicant*
DOUGLAS JEFFERSON JOHNSON	)	*D. J. Johnson*
	)	
(Defendant)	)	
	)	***T. J. Fry*** *and*
- and -	)	***R. Walichnowski***
	)	*for the Respondent*
Docket: AI23-30-09929	)	
B E T W E E N :	)	
	)	*Chambers motions heard:*
CARRIE LUCE FORSYTHE	)	***September 21, 2023***
	)	
(Plaintiff) Respondent	)	
	)	*Decisions pronounced:*
- and -	)	***December 5, 2023***
	)	
DOUGLAS JEFFERSON JOHNSON	)	
	)	
(Defendant) Applicant	)	

- and -	)
	)
RONALD COLESON CASTELANE,	)
CENTURY 21 BACHMAN AND	)
ASSOCIATES, SARAMAX INVESTMENTS	)
LTD., MANTIN CONSULTING INC.,	)
5887381 MANITOBA LTD., RAZELL	)
INVESTMENTS LTD.	)
	)
(Defendants)	)

PFUETZNER JA

[1] The defendants move for leave to appeal an interlocutory order of a judge of the Court of King's Bench denying their motions to have the plaintiff's action dismissed for delay pursuant to rr 24.01 and 24.02(1) of the MB, *Court of King's Bench Rules*, Man Reg 553/88 [the *KB Rules*]. The relevant portions of rr 24.01 and 24.02(1) are set out in the Appendix to these reasons.

Background

[2] The plaintiff purchased a home in 2012 from the defendant, Douglas Jefferson Johnson (Mr. Johnson), with the assistance of the remaining defendants (the Castelane defendants) as realtors. After taking possession of the home, the plaintiff alleged that it had defects, the remediation of which required the expenditure of significant funds. The plaintiff brought a claim against the defendants in 2014 seeking damages.

[3] Pleadings closed by February 2015 and examinations for discovery took place in 2015 and 2016. In May 2017, the Castelane defendants asked the plaintiff for answers to undertakings given during her examination for discovery. She provided answers in June 2017, at a time when she was not

represented by counsel. Nothing else occurred with respect to the litigation until the Castelane defendants filed a motion to dismiss for long delay.

[4] During this entire time frame, the plaintiff experienced challenges retaining counsel. Her first counsel was disbarred. Her second counsel withdrew over a fee dispute shortly after examinations for discovery were completed. Her third counsel went on record in September 2017 and received the litigation file in February 2018 from her second counsel, but had to withdraw shortly thereafter due to a terminal illness. The plaintiff retained her fourth counsel in December 2019.

[5] The Castelane defendants filed their motion to dismiss the action for long delay (under r 24.02(1)) on January 7, 2020. On February 3, 2021, Mr. Johnson filed a motion to dismiss the action based on both delay (under r 24.01) and long delay. The motions were not heard until December 2022, shortly after which the motion judge dismissed the motions.

The Motion for Leave to Appeal

[6] The defendants now seek leave to appeal the motion judge's order under section 25.2 of *The Court of Appeal Act*, CCSM c C240. The parties agree, as do I, that the motion judge's order was interlocutory as it did not dispose of the essential matter in dispute between the parties but rather had the effect of allowing the plaintiff's claim to proceed to trial.

[7] The Castelane defendants appeal only the motion judge's ruling that the long delay rule in r 24.02(1) does not apply. Mr. Johnson appeals both the ruling in respect of r 24.02(1) and the ruling in respect of r 24.01.

[8] In *Knight v Daraden Investments Ltd et al*, 2022 MBCA 69, this Court stated the criteria that must be satisfied by an applicant for leave to appeal an interlocutory order (at para 22):

> 1. first, the proposed ground of appeal must have arguable merit; and
>
> 2. second, the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of this Court.

Rule 24.02(1) Ruling

[9] I now turn to consider the request for leave to appeal the motion judge's ruling under r 24.02(1). Under that rule, the court must, on motion, dismiss the action if three or more years have passed without a significant advance in an action. There are enumerated exceptions to the rule, none of which apply in the present case.

[10] The primary issue before the motion judge was whether the plaintiff's provision of answers to undertakings constituted a "significant advance" (see the *KB Rules* at r 24.02(1)) in the action. The defendants asserted that there was no advance in the action for about three years and seven weeks—being from the completion of the Castelane defendants' examination for discovery of the plaintiff on November 16, 2016 until they filed their motion for dismissal on January 7, 2020. Applying the functional test set out in *Buhr v Buhr*, 2021 MBCA 63 [*Buhr*], the motion judge found that the provision of answers to undertakings was a significant advance in the action with the result that the period of delay until the filing of the motion for dismissal was only 31 months. Accordingly, he dismissed the motions.

Positions of the Parties

[11] The Castelane defendants' proposed grounds of appeal raise four issues. First, they submit that the motion judge erred by presuming that the answers to undertakings were a significant advance in the action merely because he found them to be significant to the defendants, contrary to the qualitative analysis required by the functional test in *Buhr*. Next, they maintain that answers to several of the undertakings were insufficient and perfunctory and that the motion judge failed to consider the full factual context in finding that they constituted a significant advance. Third, they assert that the motion judge erred in law in imposing an obligation on them to respond to deficient answers to undertakings, contrary to *Buhr*. Finally, they argue that the motion judge took into account adverse findings, made without any evidentiary basis, regarding the manner in which the Castelane defendants conducted their defence.

[12] Mr. Johnson asserts that:

> By applying [a] presumption that the provision of answers to undertakings is a significant advance, failing to apply the functional test and instead focusing on the Plaintiff's status as a self-represented litigant, the motion judge erroneously concluded that her delivery of partial answers to undertakings amounted to a significant advance in the action.

[13] In response, the plaintiff submits that the proposed appeals do not meet the criteria for leave to appeal. First, she argues that there is no reasonable prospect of success in light of the standard of review that would be applied; namely, palpable and overriding error. She maintains that the motion judge stated and applied the correct test and considered all of the facts

in finding that the answers to undertakings were a significant advance in the action. She asserts that the motion judge did not place an undue or any onus on the defendants to respond to the answers to her undertakings and that any comments that he made regarding defence counsel's conduct in dealing with a self-represented plaintiff were in *obiter* and did not form part of his decision.

Analysis

[14] The first criterion to be met on this motion is the establishment of a proposed ground of appeal with arguable merit. For the reasons that follow, in my view, none of the defendants have met this criterion.

[15] I agree with the plaintiff that the motion judge correctly instructed himself in respect of the functional test from *Buhr* to be applied on a motion to dismiss for long delay under r 24.02(1). Questions of the application of a legal test to the facts would be reviewed on appeal for palpable and overriding error (see *Buhr* at para 30).

[16] One must read in context the motion judge's impugned comment: "I start with the premise that the undertakings themselves were admittedly of significance to the defendants. It follows that responsive answers are significant as well" (at para 28). This is not a statement of a legal presumption, but a finding made on the facts of this case. I note that the motion judge had already instructed himself that there is no presumption that the provision of answers to undertakings is a significant advance (see para 21) and I am not convinced that there is an arguable case to be made that he made an extricable error of law.

[17] Reading the motion judge's reasons as a whole, it is apparent that he decided the motion solely on the basis of his finding that the answers to undertakings were a significant advance in the action. He provided a thorough explanation for so finding. There were 17 undertakings at issue and the motion judge noted that the defendants were satisfied with 11 of the answers. In respect of the remaining six undertakings, the motion judge reviewed each in detail, acknowledging that while two were not answered, the defendants' objection to the remaining answers "boil[ed] down to a dispute about the accuracy or veracity of the answers" (at para 29).

[18] As I have indicated, the defendants submit that the motion judge erred by making unjustified findings regarding counsel's conduct and then taking them into account in determining whether there had been a significant advance in the action. There is no dispute that the motion judge made rather pointed comments regarding the conduct of defence counsel and could have been more circumspect in his language. However, it is clear that, in respect of his decision on r 24.02(1), his comments were made in *obiter*. On a fair reading of his reasons, there is no arguable case to be made that his views on the conduct of defendants' counsel formed part of his analysis.

[19] Considering the standard of review that would be applied, I am not persuaded that there is an arguable case to be made that the motion judge made a palpable and overriding error in finding that the provision by the plaintiff of answers to undertakings was a significant advance in the particular circumstances of this case.

Decision

[20] In the result, leave to appeal the motion judge's ruling in respect of r 24.02(1) is denied.

Rule 24.01 Ruling

[21] Turning to the motion under r 24.01, it will be helpful to begin by reviewing the motion judge's reasons in some detail.

[22] He engaged the following methodology in determining whether the delay in the action was "inordinate and inexcusable" (see the *KB Rules* at r 24.01). First, he found that the action proceeded without any unusual delay from the filing of the statement of claim in 2014 until June 7, 2017 (the day following the provision of answers to undertakings), after which it "stalled about 31 months until the delay motion was filed" (at para 38). He found that "[o]n the surface, this 31 months is inordinate" (*ibid*).

[23] Second, the motion judge considered whether the 31-month period of delay was inexcusable. In doing so, he deducted therefrom the time that he found was "clearly excusable" (at para 41)—being the nearly nine-month period from June 7, 2017 to late February 2018, during which the plaintiff could not access her litigation file because of a fee dispute with her second counsel. He also deducted two months to account for the time between retaining her third counsel and being advised that he could not continue due to health reasons. After these deductions, the remaining time was 19 months.

[24] Next, the motion judge considered the remaining 19 months, which he characterized as encompassing the plaintiff's "quest for new counsel", and

asked "[i]s this time frame inexcusable?" (at para 41). He found that "six months should have been sufficient to retain new counsel" and he assessed this "as a reasonable excuse for that portion of the delay" (at para 42). Accordingly, he deducted six months from the 19 months, leaving "about 13 months of remaining delay" (*ibid*).

[25] The motion judge then returned to the original issue, and asked: "Thus, boiled down, is the 13 month period of delay, in the circumstances of this case, both inordinate and inexcusable?" (at para 43) He found that "[i]n the context of a case of this nature, started in April 2014, 13 months delay by December 2019 is not inordinate nor inexcusable *per se*" (*ibid*) [emphasis added].

[26] Importantly, the motion judge appears to have considered several additional factors in making this finding, including:

1. "[T]o a very minor extent, [the plaintiff's] personal circumstances" (at para 43), which the motion judge had earlier described as "being a single mother raising several kids, in a home requiring repairs, all the while experiencing financial and marital issues" (at para 13).

2. "[T]he fiasco of her first three counsel for which she is not to blame" (at para 43). I pause here to note that the plaintiff's first counsel was disbarred prior to the filing of the statement of claim in April 2014 by her second counsel.

3. "[H]er desire and good faith efforts to move the litigation forward" (*ibid*).

4. "[H]er sworn evidence that she did not know of a motion for dismissal and was never warned about it" (*ibid*).

5. "[T]he silence of defence counsel throughout the 31 months, which is important in that it leads to a natural inference that [the plaintiff] was lulled into believing everything was ok" (*ibid*).

[27] While the motion judge accepted that "defence counsel are not obligated to push litigation along", he nonetheless implied that defence counsel played "hard ball" by employing a "tactic" to lull the plaintiff "into a false sense of security" before springing a "trap" (at para 44). He also found that there was no demonstrated prejudice to the defendants due to the delay.

[28] Ultimately, the motion judge concluded that "the delay from the last significant advance on June 7, 2017, to the filing of the dismissal motion on January 7, 2020" was not inordinate and inexcusable and that the defendants "have [not] been prejudiced in any way by the delay" (at para 46).

Positions of the Parties

[29] Mr. Johnson asserts that the motion judge erred in three ways: first, by failing to find that the plaintiff's delay was both inordinate and inexcusable as a result of considering irrelevant factors; second, by finding that delays incurred by the plaintiff while seeking legal counsel were a reasonable excuse; and finally, by finding that defence conduct "lulled" (at para 43) the plaintiff "into a false sense of security" (at para 44) in the absence of any evidence.

[30] The plaintiff submits that there is no merit to Mr. Johnson's proposed grounds of appeal. She points out that decisions under r 24.01 are

discretionary and are entitled to significant deference on appeal (see *The Workers Compensation Board v Ali*, 2020 MBCA 122 at para 20) and that the motion judge's findings were highly contextual. She maintains that the motion judge properly applied the legal test when he found that certain periods of the delay were inordinate, that a reasonable excuse for most of that delay had been provided and "that the balance of the unexcused periods of delay were not inordinate."

Analysis

[31] In my view, there is arguable merit to Mr. Johnson's submission that the motion judge erred in the application of the test under r 24.01 in determining whether the delay here was inordinate and inexcusable. While it is by no means certain that this ground of appeal would succeed, I am persuaded that it "cannot be dismissed through a preliminary examination" (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74).

[32] In particular, Mr. Johnson raises a credible argument by questioning whether the following factors, taken into account by the motion judge, were relevant or proper considerations:

1. That the litigation was "moderately difficult" for competent litigation counsel but "very difficult" for the self-represented plaintiff (at para 37).

2. That a nearly nine-month delay while the plaintiff's litigation file was subject to a solicitor's lien was "clearly excusable" (at para 41).

3. That any of the delay was justified by the plaintiff's search for new counsel.

4. The plaintiff's status as a self-represented person and her "sworn evidence that she did not know of a motion for dismissal and was never warned about it" (at para 43).

5. The "silence of defence counsel" for 31 months and the consequent "inference that [the plaintiff] was lulled into believing everything was ok" (at para 43).

[33] Several of these factors arguably run contrary to the principle that self-represented litigants are required to familiarize themselves, and comply, with the *KB Rules* (see *Buhr* at para 47; and *Dewing v Kostiuk et al*, 2017 MBCA 22 at para 21).

[34] The fifth, and possibly the fourth, factor also raises the issue of the relevance of defence counsel's conduct in the context of a motion under r 24.01. I am aware that the alleged imposition of a duty on defence counsel to act and other criticisms of defence counsel's actions were issues also raised with respect to the motion for leave to appeal the r 24.02(1) ruling, but without success. The difference is that the motion judge's comments were clearly *obiter* in his ruling under r 24.02(1). Here, however, the motion judge's reasons are such that there is arguable merit to the submission that he considered his findings regarding defence counsel's conduct in coming to his decision.

[35] In addition, a broader issue in the ruling is the overall methodology used in the approach to r 24.01. This consisted of hiving off periods of delay

and then performing an analysis of whether the remaining period of time was inexcusable or both inordinate and inexcusable—in some instances, taking into account events that occurred prior to the time period in question.

[36] The second part of the test for leave to appeal requires that the arguable ground of appeal raised be of sufficient importance to merit the attention of a full panel of this Court.

[37] In my view, this criterion has also been met. The amendments to r 24 are still relatively new, and not many cases on r 24.01 have reached this Court. The types of factors that should be considered, and the methodology to be used in determining whether delay is inordinate and inexcusable are issues that have importance beyond just the present case.

Decision

[38] For these reasons, I grant Mr. Johnson leave to appeal on the following question:

> Did the motion judge err in the application of the test under r 24.01 in determining whether the delay in the present case was inordinate and inexcusable?

Conclusion

[39] The Castelane defendants' motion for leave to appeal is dismissed with costs to the plaintiff.

[40] Mr. Johnson's motion for leave to appeal is granted with respect only to the motion judge's ruling under r 24.01 on the question set out in

paragraph 38 above. As Mr. Johnson was only partially successful on his motion, I would make no order as to costs.

Pfuetzner JA

APPENDIX

Pertinent provisions of the *Court of King's Bench Rules*, Man Reg 553/88:

RULE 24
DISMISSAL OF ACTION FOR DELAY

MOTION FOR DISMISSAL FOR DELAY

Dismissal for delay
24.01(1) The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.

Presumption of significant prejudice
24.01(2) If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.

What constitutes inordinate and inexcusable delay
24.01(3) For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

Dismissal for long delay
24.02(1) If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless

(a) all parties have expressly agreed to the delay;

(b) the action has been stayed or adjourned pursuant to an order;

(c) an order has been made extending the time for a significant advance in the action to occur;

(d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or

(e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.