

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

MOHAMMAD MAHFUZ AL-MAMUN)

(Plaintiff) Appellant)

- and -)

MOHAMMAD MAHFUZ AL-MAMUN,)
carrying on business as SYNERGYFORCE,)
and the said SYNERGYFORCE)

(Plaintiffs))

- and -)

JANICE MARSHA PERKINS, and the said)
JANICE MARSHA PERKINS, carrying on)
business as MISSING PIECES - LOCATOR)
OF DISCONTINUED CHINA, and the said)
MISSING PIECES - LOCATOR OF)
DISCONTINUED CHINA)

(Defendants) Respondents)

M. M. Al-Mamun
on their own behalf

S. R. Restall
for the Respondents

Chambers motion heard and
Decision pronounced:
February 6, 2025

Written reasons:
February 19, 2025

CAMERON JA

[1] The plaintiff (Mr. Al-Mamun) moved to extend the time to perfect his appeal of the decision of a judge of the Court of King’s Bench (the motion appeal judge) dismissing Mr. Al-Mamun’s and his company, Synergyforce’s, (together, the plaintiffs) appeal of the decision of the senior associate judge who dismissed their action against the defendants, Janice Marsha Perkins (Ms. Perkins) and her business, Missing Pieces - Locator of Discontinued

China (together, the defendants), for delay pursuant to r 24.02(1) of the MB, *King's Bench Rules*, Man Reg 553/88 (the long delay rule).

[2] At the conclusion of the hearing of the motion, I dismissed it with reasons to follow. These are those reasons.

Background

[3] Mr. Al-Mamun claims that, apart from a period of time in 2015, he worked on the defendants' business website between 2013 and 2019. He states that he entered into a verbal agreement with Ms. Perkins regarding compensation for his labour, which was not honoured.

[4] On February 15, 2019, the plaintiffs filed a statement of claim pursuant to r 20(A), the expedited actions rule. They served their affidavit of documents on the defendants on April 30, 2019. The defendants served their responding documents on May 2, 2019. Nothing happened regarding the action until May 6, 2022, when the defendants moved for an order dismissing the action based on the long delay rule. Alternatively, the defendants asked that the action be dismissed under r 24.01(1) on the basis that there had been inordinate and inexcusable delay (the inordinate and inexcusable delay rule).

[5] On June 22, 2023, the senior associate judge granted the defendants' motion based on the long delay rule. Alternatively, she granted the dismissal based on the inordinate and inexcusable delay rule.

[6] The plaintiffs appealed to the motion appeal judge. Relying on r 24.02(3), they argued that a significant period of time should be excluded

from the overall three-year calculation due to Mr. Al-Mamun being under disability.

[7] The motion appeal judge dismissed the appeal on January 17, 2024, by way of written endorsement. He held that the long delay rule applied; therefore, the appeal must be dismissed. He found it unnecessary to determine the issue of inordinate and inexcusable delay. The order was signed by him on May 1, 2024.

[8] Mr. Al-Mamun filed his notice of appeal to this Court on June 7, 2024, and ordered a transcript of the parties' submissions before the motion appeal judge.

[9] Despite the plaintiffs having had their action dismissed for delay, Mr. Al-Mamun did not file his appeal book or factum by the deadline of August 29, 2024. On September 9, 2024, the deputy registrar wrote to Mr. Al-Mamun, advising him that, unless the appeal was perfected, it would be deemed to be abandoned on October 9, 2024. While Mr. Al-Mamun filed some documents, they were incomplete and were returned by the deputy registrar on November 21, 2024. Nonetheless, the deputy registrar extended the deadline to November 29, 2024. After some exchanged emails with the deputy registrar, Mr. Al-Mamun filed the required documents requesting an extension of time to perfect his appeal. The motion was set for February 6, 2025.

The Applicable *King's Bench Rules*

[10] Rule 24.02(1), the long delay rule, provides (with some exceptions that are not applicable here) that the Court must, on motion, dismiss an action

where three or more years have passed without a significant advance in the action.

[11] In defending the motion to dismiss made by the defendants, the plaintiffs relied on r 24.02(3), which provides that any period of time where a person is under a disability is not to be included in the calculation made pursuant to r 24.02(1).

The Decision of the Motion Appeal Judge

[12] There is no question that three years proceeded without a significant advance in the action. The issue before the motion appeal judge was whether delay between May 2019 and January 2021 should be excluded from the three-year calculation due to disability suffered by Mr. Al-Mamun.

[13] In reaching his conclusion, the motion appeal judge carefully considered Mr. Al-Mamun's affidavit and cross-examination, as well as that of his doctor, Dr. Alla Kirshner (Dr. Kirshner). However, he found that there was substantial evidence that Mr. Al-Mamun was not "incapable of managing his affairs". He noted that Mr. Al-Mamun was able to instruct counsel who represented him in the action up until and including the hearing before the senior associate judge. He also noted that Mr. Al-Mamun was able to move to a different city in 2019; that his wife and son followed him there; that he was able to rent a home for his family; that he secured full-time employment as a software engineer; that, since he had moved, he and his wife had two more children; and that he was the sole source of financial support for his family.

[14] Regarding Dr. Kirshner's opinion about Mr. Al-Mamun's inability to prosecute the action between February 2019 and May 2022, the motion appeal judge found that it was undermined by admissions she made in cross-examination that Mr. Al-Mamun was "relatively stable in 2019" and "fairly stable" in 2020. Furthermore, when Mr. Al-Mamun moved to another city in 2019, she terminated his care. After he had moved, she only had one phone discussion with him in 2022, prior to preparing her affidavit.

[15] Based on the above, the motion appeal judge concluded that Mr. Al-Mamun was not under a disability within the meaning of r 24.02(3) during the period between May 2019 to May 2022. The motion appeal judge dismissed the appeal for long delay pursuant to r 24.02(1) and ordered that the dismissal will be a defence to any subsequent action pursuant to r 24.06(1).

Criteria for Extension of Time to File a Factum and Appeal Book

[16] The criteria for extending the time for filing a factum are the same as those for extending the time to appeal. They are (i) a continuous intention to appeal from a time before the expiration of the filing period, (ii) a reasonable explanation for the delay, and (iii) arguable grounds (see *Campbell v Campell*, 2011 MBCA 23 at para 6, citing with approval *Bohemier v Bohemier*, 2001 MBCA 161 at para 2).

[17] As noted in *Singh v Pierpont*, 2015 MBCA 18: "In addition, the court has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances" (at para 41).

Discussion and Decision

[18] Based on the time of filing the notice of appeal, I am of the view that the plaintiffs have established a continuous intention to appeal.

[19] Regarding the explanation for the delay, Mr. Al-Mamun has filed an affidavit attaching a letter from his chiropractor, Dr. Patrick Kirkham (Dr. Kirkham), indicating that Mr. Al-Mamun suffers from back and neck pain, which Mr. Al-Mamun reports cause him emotional symptoms that disable him, thereby causing him to have trouble making decisions. Much like the evidence he filed before the motion appeal judge, it is based on his self-reported disability. He also submitted the results of blood work that he has had done. He says he continues to have phone appointments with Dr. Kirkham.

[20] Like the motion appeal judge, I do not dismiss or undermine the fact that Mr. Al-Mamun suffers from physical and mental health issues. However, he has given no real explanation for his delay in proceeding with his appeal other than his mental health issues, which he says cause him to not deal with matters. He offered no solution.

[21] Questioned about getting legal counsel to aid him in these proceedings, he vaguely stated that he intended to enlist the help of the Canadian Mental Health Association to see if they could provide him with services, which I took to mean legal services.

[22] Other than that, he indicated that he would try to proceed in a timely manner.

[23] Regarding arguable grounds, in *Buhr v Buhr*, 2021 MBCA 63, Simonsen JA explained that, if the criteria in r 24.02(1) have been met, then the requirement to dismiss an action is mandatory. Therefore, the applicable standard of review of a judge's decision made pursuant to r 24.02(1) is correctness. However, palpable and overriding error is the standard for determining whether the established facts satisfy the legal test set out in r 24.02(1) and findings of fact are entitled to deference absent palpable and overriding error (see *ibid* at para 30).

[24] In this case, the motion appeal judge made findings based on the evidence, including a careful consideration of the evidence presented by Mr. Al-Mamun. Mr. Al-Mamun essentially argues that the motion appeal judge erred in his assessment of the evidence regarding his disability. A review of the reasons of the motion appeal judge, considered in light of the applicable standard of review, leads me to conclude that Mr. Al-Mamun does not have an arguable case. As I described above, the motion appeal judge made clear findings, which were open to him based on the evidence.

[25] Finally, and to a lesser extent, I am of the view that Mr. Al-Mamun continues to delay the prosecution of his action, including the delay occasioned when he missed the deadlines for filing of documents in this Court. In my view, the record demonstrates that Mr. Al-Mamun does not take action until his lawsuit is under threat of being dismissed.

[26] Based on the above, I denied Mr. Al-Mamun's motion to extend time to file his appeal book and factum, and I ordered costs on tariff in favour of the defendants.