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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

DJURO KRASULJA, (Plaintiff) Appellant,	)	Appearances:
	)	Kevin D. Toyne,
	)	for the appellant
- and -	)	
LISA MANAIGRE, (Defendant) Respondent.	)	Steve Vincent and Kara Moore,
	)	For the respondent
	)	JUDGMENT DELIVERED:
	)	JUNE 2, 2021

GREENBERG J.

[1] This is an appeal from a decision of the master to dismiss the plaintiff's action for "long delay" under Rule 24.02 of the *Queen's Bench Rules*, M.R. 553/88. That rule provides that where three years have passed without a "significant advance" in the action, the court, on motion, must dismiss the action unless one of four exceptions applies. The plaintiff argues that the amendment of the statement of defence to add a counterclaim, within that three year period, was a significant advance in the action. Alternatively, the plaintiff argues that the defendant, at the time of that amendment, expressly agreed to the delay (one of the exceptions in the rule). In any event, the plaintiff argues that, in the circumstances of this case, the court should exercise its discretion to refuse to dismiss the action.

[2] For the reasons that follow, the action should not be dismissed.

BACKGROUND

[3] The following is the chronology of events on which this motion is based. The key dates are those in bold typeface:

- June 10, 2016 – The plaintiff filed the statement of claim, claiming damages against the defendant, his former lawyer, for negligence and breach of contract in representing him on his divorce.
- **January 9, 2017** - Defendant's counsel served plaintiff's counsel with the statement of defence. At the same time, he advised plaintiff's counsel that he was waiting for instructions on whether to file a counterclaim, or a separate claim, to recover unpaid legal fees. As the plaintiff had not named the defendant's law firm as a party, the defendant could not bring a counterclaim for fees unless the firm assigned the account to her. Defendant's counsel was waiting to see if the firm would assign the account or file its own claim. Defendant's counsel advised that, if the firm decided to file a separate claim for the fees, they would be asking that the claim for fees be joined with the plaintiff's action.
- February 9, 2017 - Defendant's counsel wrote to plaintiff's counsel indicating that the firm would be assigning the fees to the defendant and that he would draft the counterclaim once he received the assignment.
- February 27, 2017 - Defendant's counsel sent plaintiff's counsel a draft statement of defence and counterclaim with a consent to amend the claim which he asked the plaintiff's counsel to sign.

- April 30, 2017 - Defendant's counsel wrote plaintiff's counsel inquiring about the consent to amend.
- July 11, 2017 - Plaintiff's counsel wrote to defendant's counsel indicating that his client would consent to the amendment provided he was given an explanation as to why he was still getting unpaid fee reminder notices from the firm.
- May 15, 2018 - Defendant's counsel responded to that inquiry and asked plaintiff's counsel to provide the consent to amend.
- June 27, 2018 – Plaintiff's counsel provided the consent to amend.
- **July 9, 2018** - Defendant's counsel served plaintiff's counsel with the amended statement of defence and counterclaim with an email that said:

> I believe you required some time to file a Defence to the Counterclaim and I hereby grant you an indefinite extension of time for that purpose.

- **January 22, 2020** - Defendant filed the motion to dismiss for delay.

[4] In a brief endorsement, the Master dismissed the claim. He declined to dismiss the counterclaim because three years had not passed since the counterclaim had been filed.

NATURE OF REVIEW

[5] Rule 62.01(13) provides that an appeal from a master is a "fresh hearing". While the reasons of the master may be considered, no deference is owed (***ABI Biotechnology Inc. v. Apotex Inc. et al***, 2008 MBCA 146 (CanLII)).

[6] Appeals from a master are based on the evidence that was before the master unless leave is granted to a party to adduce further evidence (Rule 62.01(13)). The plaintiff here is seeking such leave.

MOTION FOR FRESH EVIDENCE

[7] The fresh evidence which the plaintiff seeks leave to adduce is that the defendant served an affidavit of documents on the plaintiff on October 16, 2020, after the master granted the motion to dismiss. The plaintiff wishes to introduce evidence that the affidavit of documents was drafted before the motion to dismiss was filed and that the defendant waited to serve the affidavit until after the master released his decision dismissing the plaintiff's claim. The plaintiff argues that, if the defendant had filed the affidavit before bringing the motion to dismiss, it would have constituted a significant advance in the action which would have precluded the motion to dismiss from succeeding.

[8] The criteria for admitting fresh evidence on an appeal from a master are that (***Green v. Tram et al***, 2016 MBCA 99 (CanLII), at para. 25):

- the evidence could not have been tendered at the initial hearing had due diligence been exercised;
- the evidence is relevant;
- the evidence is credible; and
- the evidence could reasonably have affected the result.

[9] The defendant acknowledges that the proposed evidence was not known to the plaintiff before the motion was heard by the master, so it could not have been tendered at that hearing. The defendant also acknowledges that the evidence is credible. However, the defendant argues that the evidence is not relevant to the motion and could not have affected the result. I agree.

[10] A defendant is not required to serve an affidavit of documents until pleadings are closed (Rule 30.03). As the plaintiff has not yet filed a defence to the counterclaim, the defendant was not required to serve her affidavit before proceeding with this motion. In

any event, as I will explain, the key issue in this motion is whether there was a significant advance in this action between January 2017 and January 2020. That issue turns on what actions the defendant did take during that period not on what actions she failed to take.

[11] In oral argument, the plaintiff resiled from the suggestion that the defendant intentionally delayed serving the affidavit to ensure the motion to dismiss would succeed. Had there been evidence of sharp practice, that may have been relevant to the motion.

RULE 24.02

[12] Until recently, motions to dismiss an action for delay were focused on whether the delay caused prejudice to the moving party. Amendments to Rule 24, which came into effect on January 1, 2018, made significant changes to the approach to delay. While the amendments retained the ability to dismiss an action where prejudice is established (Rule 24.01), the "long delay" rule (Rule 24.02) was added. This rule allows an inactive claim to be dismissed even without showing prejudice. Rule 24.02 reads:

> **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;
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> (c) an order has been made extending the time for a significant advance in the action to occur;
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> (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
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> (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.

Excluded time

24.02(2) A period of time, not exceeding one year, between service of a statement of claim and service of a statement of defence is not to be included when calculating time under subrule (1).

[emphasis added]

[13] While the application of Rule 24.02 will be fact-specific, the rule is not as nuanced or flexible as Rule 24.01. Transitional provisions (Rule 24.02(4)) stipulate that the long delay rule only applies to motions to dismiss brought after January 1, 2019. Delaying the implementation of the rule allowed time for lawyers to take steps on files that had been dormant to avoid the harsh effects of the new rule. As Martin J. explained in ***D.L. et al. v. C.P. et al.***, 2019 MBQB 42 (CanLII), at para. 32:

> The revised Rules change the focus to spotlight delay, which is often more defined and demonstrable than prejudice. A sharper, perhaps harsher, dawn is at hand. Particularly with Rule 24.02 now in force, with its very limited exceptions, counsel and parties will have to be most vigilant to advance actions. Stagnant actions will be weeded out, and active claims finished swifter. Balancing for "a kind of essential justice" will not save the day.

[14] Because of its recent vintage, there is little Manitoba jurisprudence interpreting Rule 24.02. But decisions under the comparable Rule 4.33 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, can provide guidance in interpreting the rule.

ISSUES IN THIS CASE

[15] The defendant's motion raises three issues:

1) Have three or more years passed without a significant advance in this action?

   The three year time period began to run on January 9, 2017, when the statement of defence was filed (Rule 24.02(2)). The issue is whether the filing of the counterclaim was a significant advance in the action which reset the clock.

2) If there has not been a significant advance, do any of the four exceptions apply?

   The only exception raised by the plaintiff is Rule 24.02(1)(a) - that the delay was expressly agreed to by the defendant either through an email exchange between counsel in January 2017 or by an email from defendant's counsel when he served the counterclaim.

3) If one of the exceptions does not apply, is there any discretion to refuse to dismiss the action?

4) If the claim is dismissed for delay, should the counterclaim also be dismissed?

ANALYSIS

Was the filing of the counterclaim a "significant advance" in the action?

[16] In considering the similar Alberta rule, the Alberta courts have held that a functional approach should be used to determine whether there has been a significant advance in an action. That approach was explained in ***Ursa Ventures Ltd. v. Edmonton (City)***, 2016 ABCA 135 (CanLII):

> [11] Rule 4.33 operates like a limitation period: a cause of action can be saved by issuing a statement of claim one day before the two year limitation expires and likewise, a dormant action can be saved by something that significantly advances it in the 35th month, notwithstanding how much delay there has been to that point. It is noteworthy that r 4.33 says "without a significant advance", not "without continuous significant advancement". It follows that I cannot endorse my colleague's approach of determining what a reasonably diligent litigant would do within the three year period. The drop dead rule permits inaction for close to three years as long as something is done to significantly advance the action prior to the expiration of the three years.
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> . . .
>
> [18] The new Rules use a functional approach. Their purpose and intent, as emphasized in the foundational rule 1.2, is to provide fair and just resolution of claims in a timely and cost effective manner. The foundational rules parallel a cultural shift in litigation that deemphasises trial as the dominant mechanism of resolving civil disputes in favor of procedures such as summary dismissal and alternative dispute resolution: *Windsor* at para 15; *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123 (available on CanLII); *Heurto v Canniff*, 2014 ABQB 534 at paras 13-15, aff'd 2015 ABCA 316.

> [19] Under the delay Rules the functional approach inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form: *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para 19, 585 AR 81.
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> [20] The argument in favour of ruling that a mandatory step must always significantly advance an action is that the litigation cannot advance without that step. However, the question under r 4.33 is whether there has been a significant advance in the action. Was the step essential to the resolution of the action? In many instances, the mandated step will not only advance, but will significantly advance, the action. For example, a statement of defence will normally significantly or substantially advance an action because it narrows the issues and enables the plaintiff to know the case it must meet. But not every mandated formalistic step will always meet the functional test.
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> [emphasis added]

[17] The functional approach has been adopted in Manitoba (***Fehr et al. v. Manitoba Public Insurance Corporation et al.***, 2019 MBQB 64 (CanLII); ***WRE Development Ltd. v. Lafarge Canada Inc.***, 2021 MBQB 37 (CanLII); ***Nygard International Partnership v. Canadian Broadcasting Corp. et al.***, 2020 MBQB 71 (CanLII); ***Buhr v. Buhr***, 2020 MBQB 107(CanLII)).

[18] The plaintiff argues that the filing of the counterclaim in July 2018 was a significant advance in this action. The defendant says that the filing of the counterclaim is not an advance in the plaintiff's action because the obligation is on the plaintiff to move the action forward and the plaintiff took no steps to advance his action after October 2016, when he served the statement of claim on the defendant. Two points must be made in response to that argument. First, it is clear that the three year period in the long delay rule does not start to run until the statement of defence is served, which in this case was on January 9, 2017 (Rule 24.02(2)). Second, while the plaintiff does have the obligation to move his case along, Rule 24.02 provides that an action must be dismissed where

three years have passed without "a" significant advance. It does not say that the action must be dismissed if the plaintiff has not taken steps to advance the claim. Nor does the case law support an interpretation that it is only steps taken by the plaintiff that will constitute a significant advance in the action. In fact, the ***Ursa Ventures*** decision, which was relied upon by the defendant, says the opposite. The court there held that the filing of a statement of defence will usually significantly advance an action.

[19] The defendant also argues that the filing of the counterclaim was not a significant advance in the plaintiff's action because it constitutes an independent claim which is not inextricably linked to the main action. That is to say, the defendant says that the progress of the main action must be assessed without any reference to the counterclaim. Quite frankly, that makes no sense. A counterclaim is not prosecuted independently from the original claim. The parties do not serve separate affidavits of documents for the claim and counterclaim, conduct separate examinations for discovery, or set separate pre-trials. And of course only one trial is set. The fact that the counterclaim could proceed if the main action is abandoned or dismissed does not mean that the claim and counterclaim are not linked. Moreover, it is an odd argument for the defendant to say that the claim and counterclaim in this case are not inextricably linked when defendant's counsel made it clear to plaintiff's counsel when he filed the statement of defence that, even if he made the claim for unpaid fees by way of a separate claim, he would be asking that the two claims be heard together. So the defendant's position from the start was that the two claims are linked. And they clearly are linked. The plaintiff's allegation of negligence and breach of contract would be a defence to the action for fees.

[20] The defendant relies on ***XS Technologies Inc. v. Veritas DGC Land Ltd.***, 2016 ABCA 165 (CanLII), as holding that the failure of the defendant to advance its counterclaim does not detract from the plaintiff's obligation to pursue the original action. But that is not the issue here. The plaintiff is not relying on the failure of the defendant to take steps but on the fact that the defendant did take steps (the filing of the counterclaim) which effectively advanced both claims toward trial.

[21] The defendant also relies on ***Déjà Vu Holdings Ltd. v. Securex Master Limited Partnership***, 2018 ABQB 597 (CanLII), where the court held that the defence to counterclaim filed by the plaintiff was not a significant advance in the action. The court acknowledged that a pleading will usually significantly advance an action, but found that the defence in that case was a general, boilerplate denial that did not accomplish that. There is no comparison between that defence and the counterclaim in this case. The counterclaim here was significant in defining the issues for trial. The case could not advance further until it was filed.

[22] The defendant says that the plaintiff took no significant steps in this action after serving the statement of claim. But, as explained in ***Ursa Ventures***, the long delay rule does require continuous advancement in an action. It permits inaction for close to three years as long as something is done to significantly advance the action prior to the expiration of the three years.

[23] It is true that the plaintiff has been lax in pursuing his claim, but the defendant has been equally lax. It took defendant's counsel 10 months to reply to an inquiry that allowed the plaintiff to consent to the amendment to add the counterclaim. As stated in

Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd., 2019 ABCA 276 (CanLII) (albeit not a long delay case):

> [27] It is correct to say that the plaintiff has the primary obligation in moving the litigation forward. The *Rules of Court* give the plaintiff many tools to ensure that happens. It does not follow, however, that a defendant has no obligation with respect to the pace of litigation. This was confirmed, for example, in Sir Alfred McAlpine at p. 260:
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> > Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. . . .

[24] The four Manitoba decisions referred to above (para. 17) are the only reported Manitoba decisions under Rule 24.02. It is clear from those cases, as well as the Alberta cases relied upon, that assessing whether a step significantly advances an action is fact specific. For example, in ***Nygard International Partnership***, the master held that the delivery of the plaintiff's affidavit of documents was a significant advance in the action as it provided the defendant with the first look at the evidence being relied upon and was a meaningful step forward. However, the provision of a second affidavit of documents, which listed less than 10 documents, was not a significant advance because it did not change the status quo given its similarity to the original affidavit. And in ***WRE Development Ltd.***, Bock J. found that the defendant's partial answer to undertakings made at discovery did not constitute a significant advance, although he acknowledged that answers to undertakings may be a significant advance, depending on the context. None of the Manitoba cases considered whether the filing of pleadings is a significant advance in an action.

[25] Once defendant's counsel indicated that he would be filing a claim for fees, the plaintiff could not advance the action further until the defendant had done so. Applying the functional approach, I find that the counterclaim in this case clarified the issues in dispute and moved the case forward in an essential way. For that reason, the defendant's motion should not succeed.

Did the defendant expressly agree to the delay?

[26] If I am wrong in concluding that the filing of the counterclaim was a significant advance in the action, I find that the defendant's motion should be dismissed because she agreed to delay the proceedings.

[27] The plaintiff argued that the defendant agreed to delay at two stages of the proceedings: 1) by an exchange of emails on January 14 and 15, 2017; and 2) by defendant counsel's email of July 9, 2018, granting the plaintiff an indefinite extension to file a defence to the counterclaim.

[28] The first exchange of emails occurred after defendant's counsel advised plaintiff's counsel that he was awaiting instructions on how to proceed with the claim for fees. Plaintiff's counsel wrote to defendant's counsel asking if he would agree to delay the filing of a reply to the statement of defence until the defendant advised if they would be bringing a counterclaim for fees or proceeding with a separate action. Defendant's counsel replied that he agreed with that proposal. Arguably, that email effectively stopped the clock until the defendant's counsel advised the plaintiff that he would be filing a counterclaim (February 9, 2017) and removes more than three weeks from the three year period, making the filing of this motion on January 22, 2020 (13 days after the three years expired), premature.

[29] But it is the email sent by defendant's counsel on July 9, 2018, which, in my view, brought proceedings to a standstill. I repeat it here:

> I believe you required some time to file a Defence to the Counterclaim and I hereby grant you an indefinite extension of time for that purpose.

[30] In ***Brian W Conway Professional Corporation v. Perera***, 2015 ABCA 404 (CanLII), the court commented on what is an "express" agreement under the comparable Alberta Rule:

> [26] Rule 4.33 is the successor to rules 243.1, 244 and 244.1 of the former Rules of Court. In our earlier decision *Bugg v Beau Canada Exploration Ltd* at paras 8-9, this court made the following observation with respect to rule 243.1(1)
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> > Rule 243.1(1) dictates that a standstill agreement must be "express". Black's Law Dictionary defines that term as follows:
> >
> > Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference ... Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied".
> >
> > Henry Campbell Black, Black's Law Dictionary, 6th ed.
> >
> > (St. Paul, MN: West Publishing Co., 1990.)
> >
> > In the context of R. 243.1(1), express means that the parties' intention is clear and not left to inference: *Webber v Canada (Attorney General)*, 2005 ABQB 718 (Alta. Q.B.) at para. 54. A standstill agreement cannot be implied from conduct: 525812 *Alberta Ltd. v Purewal* (2004), 366 A.R. 1, 2004 ABQB 938 (Alta. Q.B.) at para. 13. At the very least, the evidence must establish the basic elements of an agreement: for example, the identity of the parties to the contract, when the standstill began and its essential terms.

[31] In ***Turek v. Oliver***, 2014 ABCA 327 (CanLII), the defendant's motion to dismiss the action for delay was dismissed. Defendant's counsel had asked plaintiff's counsel for

an extension of time to produce an affidavit of documents. The affidavit was not produced in spite of a follow up by plaintiff's counsel. Instead, a few months later, the motion to dismiss was brought. The Alberta Court of Appeal found that the agreement between counsel to extend the time to produce started the clock running again. Slatter J.A. explained:

> [6] Whether an agreement between counsel is sufficient to advance an action (and start the clock running again) will depend on the facts and circumstances. It was not unreasonable for the chambers judge to hold in this case, given the plethora of excuses advanced by counsel for the appellants, that it was not unreasonable for respondent's counsel to rely on it. The drop dead rule was never designed to encourage the sort of ambush that was unleashed here, after months of courtesies by one side and obfuscation and unresponsiveness by the other.

[32] The defendant argues that her counsel's email was a professional courtesy and not an agreement to delay. I am not sure how one determines the difference between the two especially when considering a "courtesy" or agreement that pre-dates the enactment of Rule 24.02. The email on which the plaintiff relies was sent before Rule 24.02 came into effect, so one might assume that the effect of the email on the application of the rule was not considered by counsel. But that does not mean it should be dismissed as merely a courtesy. The question is whether it evidences a clear intent to delay proceedings.

[33] Defendant's counsel suggests there must be something formal, something in the nature of a written contract, to qualify as an express agreement to delay. He also suggests that the exception in Rule 24.02(1)(a) does not apply unless the agreement has a temporal limitation. As an example of the type of agreement that may meet the terms of the rule, counsel provided a four-page precedent for a "standstill agreement" where

litigants agree not to proceed in an action while awaiting the outcome of some other event. To be sure, that type of agreement would preclude a motion to dismiss for delay. But nothing in Rule 24.02(1)(a) suggests an agreement to delay need be in any specific form as long as it is "express", that is to say, it must be clear.

[34] There are not yet any Manitoba decisions interpreting Rule 24.02(1)(a). I agree with the comments of Slatter J.A. that, as with an agreement in any context, whether there is an agreement and the nature of the agreement will depend on the facts and circumstances of the case. In oral argument, counsel for the defendant acknowledged that his email would preclude him from noting default on the counterclaim without first giving the plaintiff an opportunity to file a defence. Yet he argues that the extension he granted does not prevent him from holding the plaintiff to the strict letter of the three-year rule. (As I said, he filed the motion to dismiss 13 days after the three years expired.) In my view, counsel's concession that the email prevented him from noting default is confirmation of an agreement to delay proceedings. It would be reasonable for the plaintiff to assume that the proceedings were at a standstill, that is to say, to assume not only that the defendant would not note default without further notice but that she would not seek to dismiss for delay without further notice.

[35] Practice under Rule 24.02 is in an embryonic stage and undoubtedly will develop over time. It would be prudent in future for counsel to turn their minds to the rule and specifically address it in any agreement to delay proceedings. But agreements that pre-date the rule should be interpreted with some regard to past practice. I am satisfied

that the email of July 9, 2018, was an express agreement to delay proceedings and that it is an answer to the motion to dismiss.

CONCLUSION

[36] The filing of the counterclaim was a significant advance in the action that reset the three year clock in the long delay rule. Alternatively, the defendant's agreement to extend the time for filing the defence to counterclaim exempts the plaintiff from the strict application of the rule.

[37] In view of my decision on the first two issues, I do not need to address the plaintiff's argument that there is a residual discretion to refuse to dismiss an action where none of the exceptions apply. However, I note that the mandatory language of Rule 24.02 ("must" dismiss) when compared to the permissive language of Rule 24.01 ("may" dismiss) would suggest no such discretion exists.

[38] As I am not dismissing the claim, I also do not have to deal with the issue of the status of the counterclaim.

[39] The appeal is allowed and the defendant's motion is dismissed.

_____J.