Date: 20221207
Docket: CI 18-01-15522, CI 18-01-15523
CI 18-01-15524
(Winnipeg Centre)
Indexed as: Lofchick v. Belkin et al
Lofchick v.Belkin et al
Lofchick v. Belkin et al
Cited as: 2022 MBKB 235

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

BERNARD LOFCHICK, plaintiff, -and- MICHAEL PETER BELKIN, RANDALL WILLIAM RANICK, and 6798498 MANITOBA LTD., defendants	)	Richard Beamish Counsel for the plaintiff Stephan J. Thliveris Counsel for the defendants Michael Peter Belkin and Randall William Ranick
BERNARD LOFCHICK, plaintiff, -and- MICHAEL PETER BELKIN, BELKIN HOLDINGS LTD., RANDALL WILLIAM RANICK, RAN-ROY HOLDINGS LTD., 5684855 MANITOBA LTD. and 6993592 MANITOBA LTD., defendants,	)	
BERNARD LOFCHICK, plaintiff, -and- MICHAEL PETER BELKIN, BELKIN HOLDINGS LTD., RANDALL WILLIAM RANICK, RAN-ROY HOLDINGS LTD., and 6976227 MANITOBA LTD., defendants.	)	JUDGMENT DELIVERED: December 7, 2022

SENIOR MASTER CLEARWATER

[1] These matters came before the court by way of motions brought by the defendants, Michael Peter Belkin, Randall William Ranick, and the named

corporate defendants (collectively "the defendants"). The first motions filed were to dismiss the actions before the court for delay in accordance with Rule 24 of the Court of King's Bench Rules (the "Rules"). The second motions filed by the defendants, were filed after Notices of Discontinuance (the "discontinuances") had been filed by the plaintiff on all three actions.

[2] The defendants' second motions were to strike the discontinuances filed by the plaintiff as an abuse of process, or otherwise modify the discontinuances, on the same basis, to include a provision that the discontinuance was with prejudice to the plaintiff's rights to file new claims. It is these second motions, hereinafter the abuse of process motions, that are the subject matter of this decision.

[3] The abuse of process motions proceeded, with consent, to be heard together. This decision applies to each of the three actions. For the reasons set out below, I am dismissing the motions.

Facts

[4] The relevant facts in this case are not in dispute. In each of these three files, the same plaintiff brought an action against the same personally named defendants and their various corporations for recovery of debts owed pursuant to alleged loan agreements between the parties. The three related court files for which these motions were heard are King's Bench File Nos. CI 18-01-15523, CI 18-01-15524 and CI 18-01-15522. These matters will be collectively referred to as the claims.

[5] It is conceded by the parties that each of the claims relate to matters of a similar or common nature. The claims were all filed on or about June 9, 2018. The defendants were properly served, and ultimately filed motions for consolidation of the three files, along with an order for particulars. Those motions last appeared before a judge of this court on November 16, 2018, and were adjourned *sine die*. No particulars were ever filed, no consolidation was formally granted, no defences were filed, and no further court steps were taken after November 16, 2018, until the defendants filed their motions to dismiss for delay pursuant to Rule 24.02 on November 16, 2021 (the "delay motions").

[6] On December 7, 2021, the day before the delay motions were originally set for a first appearance on the masters' uncontested list, the plaintiff filed the discontinuances pursuant to Rule 23.01(1)(b)(i) and (ii). These discontinuances were filed without consent, or leave of the court, as no defences had been filed and the pleadings remained open.

[7] Despite the discontinuances, the delay motions proceeded on the masters' uncontested list on December 13, 2021. Given the relatively recent filing of the discontinuances, counsel for the defendants noted the possibility of filing further motions to set aside the discontinuances as an abuse of process. The court noted that it would, for the time being, adjourn the delay motions to allow the filing of the abuse of process motions, if required. Further, as noted on the disposition sheet, the court indicated that any abuse of process motions, if filed, would likely need to be heard in advance of the delay motions given the discontinuances on

file. Ultimately, the defendants did file the within motions and they appeared for the first time before the presiding master on April 4, 2022.

[8] At this first appearance, the master adjourned the matter *sine die* for further discussions and, amongst other things, raised the concern that the motions were outside the jurisdiction of the masters. The concern is noted on the disposition sheet, and counsel were directed to consider the issue of jurisdiction given the defendants' reliance on the inherent jurisdiction of the court for the relief requested.

[9] The abuse of process motions did appear one time on the judges' civil list. The learned justice directed the matter to appear before the master to consider the issues raised by the abuse of process motions. The parties then set the matter down for a contested hearing as directed.

Positions of the parties

[10] The position of the plaintiff throughout was that the claims were properly discontinued by way of right pursuant to the Rules. He argues that, given the pleadings remained open, and no defences were filed, there was no requirement for him to obtain consent or leave of the court to discontinue, and likewise no requirement for him to include a without prejudice provision in the discontinuances. As a result, says the plaintiff, the matter is formally at an end, and the master's jurisdiction is *functus*.

[11] The plaintiff further says, while he disputes that the relief sought is appropriate, given no proceedings or actions remain before the court, the only way for the relief requested by the defendants to be granted, would be pursuant to the court's inherent jurisdiction. The plaintiff suggests the master does not possess that type of jurisdiction and therefore, the motions must be dismissed.

[12] In addition, if the master does find it retains some jurisdiction, the plaintiff suggests there is no evidence before the court that would make this case one where the court should exercise its discretion to strike the discontinuances and/or amend same. The plaintiff has, in strict compliance with the rules, discontinued his action by way of right. There is no evidence he acted inappropriately, or in abuse of the court's process. To the contrary, he complied with the very process developed for this purpose. The relevant rule in support of his position is rule 23.01(1)(b) as follows:

> **Notice of Discontinuance**
> 23.01(1) A plaintiff may discontinue all or part of an action against a defendant,
> . . .
> (b) where the statement of claim has been served on the defendant and the pleadings are not closed,
>
> > (i) by serving a Notice of Discontinuance (Form 23A) on all parties who have been served with the statement of claim, and
> > (ii) by filing the Notice along with an affidavit of service of the Notice upon the defendant;

[13] Finally, the plaintiff says there is no basis in law, and certainly no jurisdiction for the master, to consider amending the language, more specifically adding language to the discontinuance to include a with prejudice statement.

[14] The defendants, for their part, say the court must consider the whole of the circumstances in assessing the actions of the plaintiff in this case. The basis of the abuse of process determination, say the defendants, relates to the timing of the plaintiff's discontinuance. The defendants argue that the plaintiffs only discontinued the matters after the dismissal for long delay motions were filed, thereby avoiding a full hearing on the delay motions, and a possible outcome that would prohibit further actions being taken by the plaintiff in the future.

[15] The defendants provide authorities in support of the proposition that, depending on the circumstances, a court may set aside a notice of discontinuance as an abuse of process even where the discontinuance was filed in strict compliance with the Rules, as is the case here. In those cases, the court confirms its inherent jurisdiction and authority to set aside properly delivered discontinuances as abuses of process. The courts refer, in those cases, to proportionality concepts, such as those codified in our Rule 1.04, as partial support for same. This, say the defendants, is the foundation for the masters' jurisdiction in this case, along with s.75 of *The Court of King's Bench Act*, C.C.S.M. c. C280 (the "*Act*").

[16] The defendants urge the court to consider, as a guiding principle in the assessment, the concept of *dominus litis*. This principle, which the defendants argue underpins the concept of discontinuance by right, refers to the point in a proceeding where the plaintiff is no longer the one wholly controlling the outcome of the

proceeding. It is described by Grauer J.A. in the case of ***DLC Holdings Corp. v Payne***, 2021 BCCA 31, at paragraphs 24 and 25 as follow:

> **24** This rule descends directly from the 1883 English rule, Order XXVI, r.1. That rule was enacted to simplify and provide certainty of application to the "old system", by which plaintiffs could voluntarily elect to be non-suited, preserving the right to bring fresh actions on the same subject matter: see the speech of the Earl of Halsbury LC affirming the judgment of the Court of Appeal in *Fox v The Star Newspaper Company, Limited*, [1900] AC 19. As Lord Justice Chitty put it in the Court of Appeal, [1898] 1 QB 636 at 639:
>
> > ...The term "discontinuance" may have had at one time a more limited meaning than it has in Order XXVI., r. 1, but it is obvious on the face of that rule that the term is there used in a broad sense, and is intended to cover the case of what in a common law action was termed a nonsuit as well as the power which a plaintiff in Chancery formerly had of dismissing his own bill. The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."
>
> [Emphasis added.]
>
> **25** Under Order XXVI, r. 1, that "certain stage", when the plaintiff is "no longer dominus litis", was reached with the receipt of the defendant's defence, or after that before taking a further step in the proceeding:
>
> > The plaintiff may, at any time before receipt of the defendant's defence or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-

> claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

[17] The defendants in this case, say that the *dominus litis* has shifted given the filing of the delay motions, and as such, the plaintiff's discontinuances are an abuse of process, and should be set aside. The defendants point to the case of ***Kawaguchi v. Kawa Investments Inc.***, 2021 ONCA 770 in support, amongst others.

[18] The defendants further say, in this case the evidence supports that the notice of discontinuances were filed for an improper purpose, that is, to avoid a final disposition of the matter. Therefore, the defendants argue that the court, based on rule 1.04, s.75 of the *Act*, and its inherent jurisdiction to control and govern its own process, may strike the discontinuances in accordance with the *Act*. The relevant section of the *Act* and Rules state:

> **Abuse of process**
> s.75 Nothing in this Part limits the authority of the court to stay or dismiss a proceeding as an abuse of process or on any other ground.
>
> **General principle**
> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **Proportionality**
> 1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:
> (a) the nature of the proceeding;
> (b) the amount that is probably at issue in the proceeding;
> (c) the complexity of the issues involved in the proceeding;
> (d) the likely expense of the proceeding to the parties.

[19] The defendants acknowledge it may be rare, but argue that the court, including the masters in this case, do continue to have the inherent jurisdiction to label the discontinuances an abuse of process. The defendants submit that jurisdiction is codified in the proportionality principles set out in the Rules.

Analysis

[20] While I acknowledge that there does appear to be some lingering jurisdiction of the court to find a notice of discontinuance to be an abuse of process in certain cases, for the reasons that follow, I disagree the master has that jurisdiction on these facts. In my view, and specifically contemplating rule 1.04, coupled with the statutory interpretation of s. 75 of the *Act*, that lingering jurisdiction, where the claim has been discontinued in strict compliance with the Rules, would be restricted to a superior court judge. This is also supported by the fact that, in every case relied upon by the defendants in support of this type of abuse of process motion, the decision to set aside was made by a superior court judge, with clear inherent jurisdiction.

[21] Firstly, concerning rule 1.04, which, as suggested, effectively triggers the general supervisory jurisdiction of the masters to manage their own court process, that jurisdiction and authority necessarily has some restrictions. In this case, by the time of the first appearance before the masters, the claims had been wholly discontinued. I agree with the plaintiff that the discontinuances, filed in accordance with the Rules, make the master's supervisory jurisdiction *functus*.

[22] In coming to this conclusion, one must start with a consideration of the legal basis for the masters' jurisdiction, and how it has been interpreted in Manitoba. The question of the origin and extent of a masters' jurisdiction in this province was squarely addressed by the Court of Appeal in ***Zalizniak v. Zalizniak et al***., 2007 MBCA 118, and by Suche J. in ***Jewish Community Campus of Winnipeg Inc. v. Metaser et al.***, 2013 MBQB 303. To sum it up, Suche J. says, at paragraph 9, "The master is a creature of statute, whose authority must be founded in specific legislative direction." (emphasis mine)

[23] ***Zalizniak***, at paragraph 7, further points to section 11.15(1) of the *Act*, the section governing the masters' authority and jurisdiction, which expressly provides that the jurisdiction is restricted to that specifically provided for in statutes, regulations made under statutes, or the court rules. This remains the starting point for any analysis on jurisdiction for the masters in Manitoba.

[24] Since the ***Zalizniak*** and ***Metaser*** cases, the question of the jurisdiction of masters has been recently reviewed by our court in ***Ryan v. Ryan***, 2022 MBKB 198. In this case, the question before the court related to whether or not a master has the jurisdiction to remove counsel of record, a power that is often referred to as one arising from inherent jurisdiction. The learned justice in ***Ryan***, in reliance on a decision of the Supreme Court, ***R. v. Cunningham***, 2010 SCC 10, ultimately concludes that, in light of the "supervisory jurisdiction" of courts to control their own processes, the masters' jurisdiction extends to the issue of removal of counsel on matters before it.

[25] The ***Ryan*** case is also binding on this court, and makes it clear that the masters do have some level of supervisory jurisdiction, including to address removal of counsel in appropriate circumstances. It is possible that ***Ryan***, coupled with rule 1.04 as relied upon in this case, would extend to the masters some jurisdiction to manage matters of abuse of process, or other procedural issues, in a supervisory context during a proceeding before it, or as otherwise provided for by statutes or rules. This is assuming, as a starting point, there is a proceeding properly before the court.

[26] Unfortunately in this case, the discontinuances, given they were filed in strict compliance with Rules, expunged the proceedings before the court. To set those discontinuances aside as an abuse of process where there has been no breach of rule 23.01, or to somehow amend the discontinuances' impact on the future rights of the parties, goes beyond the mere supervisory jurisdiction over the court's own processes. Simply put, there is currently, without further order of a court, no action to supervise.

[27] The required order, which would be required in this case, is to revive a proceeding. That type of order, in my view, clearly takes you into the realm of reliance on a superior court's inherent jurisdiction. Rule 1.04 cannot be read as extending that jurisdiction to the masters.

[28] As a result of my finding that rule 1.04 alone does not extend the masters' jurisdiction on these facts, I must address whether nevertheless, the master has

jurisdiction under s.75 of the *Act*, also relied upon by the defendants, or any other statute or rule.

[29] On an examination of the language in s.75, and whether the master can rely on the reference therein to the extension of the "authority of the court to stay or dismiss a proceeding as an abuse of process or on any other ground," the starting point must be the definitions in the *Act*, and related sections concerning the constitution of the court.

[30] The following are the relevant parts:

> **Interpretation**
> 1 In this Act,
> . . .
> **"court"** means the Court of King's Bench of Manitoba and includes the Court of King's Bench of Manitoba (Family Division);
> . . .
>
> **Continuation of Court**
> 2 His Majesty's Court of King's Bench for Manitoba shall continue as a superior court of record, having civil and criminal jurisdiction, under the name of the "Court of King's Bench of Manitoba".
>
> **Composition of Court**
> 5(1) Subject to subsection (2), the court shall consist of the following offices:
> (a) the Chief Justice who shall be called the "Chief Justice of the Court of King's Bench";
> (b) the Associate Chief Justice of the Court of King's Bench who shall be called the "Associate Chief Justice of the Court of King's Bench" and who shall be the senior associate chief justice;
> (c) the Associate Chief Justice of the Court of King's Bench (Family Division) who shall be called the "Associate Chief Justice of the Court of King's Bench (Family Division)"; and
> (d) 31 other judges, of whom
> (i) 19 are judges of the court, other than the family division, and
> (ii) 12 are judges of the family division.

[31] If you consider those definitions in the *Act,* and contrast it to the definition in our Rules, which specify that, "In these rules…" a reference to "court" includes a master and a judge, it is clear the use of the term court in the *Act* was not intended to include a master. In fact, the definition in the Rules, is specifically noted as limited to the Rules, and does not necessarily inform, or extend to any other legislation. Where the *Act* extends authority and jurisdiction to the master, it specifically says "the master". The result is that s.75 of the *Act* cannot be read to extend to the masters the general inherent authority to consider abuses of process, unless the circumstances of such a consideration are provided for somewhere else in a statute, regulation, or the Rules.

[32] Of note, the only place in the Rules where the power for the masters to strike pleadings or other documents as an abuse of process is provided for, and aside from the limited supervisory jurisdiction in a proceeding as discussed above, is in rule 25.11. While not relied upon by the defendants in this case, I did ask for some comment on that rule from counsel during submissions.

[33] Having heard brief submissions, and on consideration, I am satisfied rule 25.11 would likewise not apply to these circumstances. This is so for reasons that go beyond simply that rule 25.11 was not properly pled, or relied on.

[34] Rule 25.11 reads as follows:

> 25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious;
> (c) is an abuse of the process of the court; or
> (d) does not disclose a reasonable cause of action or defence.

[35] As counsel for the plaintiff commented, rule 25.11 is used to address proceedings that are before the court, usually, although not necessarily restricted to addressing issues of inadequacies, or other concerns with pleadings. As noted above, and as argued by the plaintiff, there are no longer any pleadings or actions before the court to consider. I agree. The master is *functus*.

[36] I do further note, to the extent it highlights the jurisdictional challenges, that the issue of abuse of process under rule 25.11 could, and often is used in circumstances where, after the discontinuance or other completion of an action, a similar claim is filed. Rule 25.11 allows a consideration by the master of whether or not that 'new' pleading, in an active proceeding, is an abuse of process and should be struck. While these defendants may not be prevented from filing such a motion in the future, should the circumstances arise, that is for another day. This cannot, and should not be determined prematurely by the master.

[37] In light of all of the above, I am dismissing the abuse of process motions given a lack of jurisdiction for the master to provide the type of relief sought by the defendants on these facts.

[38] However, even if I am incorrect in my analysis, and the master does have jurisdiction, I would nevertheless have dismissed the motions in this case. I am not satisfied on these facts that an abuse of process has occurred by the filing the discontinuances. Unlike in all of the other cases relied upon by the defendants, there are no facts here that support the discontinuances were filed for any

improper reason, or facts led to satisfy the court the *dominus litis* has shifted, such that a discontinuance would be inappropriate.

[39] For the all of the reasons set out above, I am dismissing the motions by the defendants. If costs cannot be agreed they may be spoken to.

K. L. Clearwater
Senior Master