Date: 20240712
Docket: CI 19-01-25076
(Winnipeg Centre)
Indexed as: Schneider et al. v. Moffatt
Cited as: 2024 MBKB 106

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CHRISTOPHER PAUL SCHNEIDER and DR. CHRISTOPHER PAUL SCHNEIDER, A MEDICAL CORPORATION,	)	Troy P. Harwood-Jones Jeffrey D.H. King for the plaintiffs
plaintiffs,	)	
-and-	)	Kelly L. Dixon for the defendant
DANA MOFFATT,	)	
defendant.	)	Judgment Delivered: July 12, 2024

BOND J.

BACKGROUND

[1] The defendant moves to dismiss the plaintiffs' action for delay. For the reasons that follow, the motion is dismissed.

[2] Dr. Christopher Schneider is a medical doctor who provided gastroenterology services. Dr. Schneider claims that Dr. Dana Moffatt, in his capacity as the Medical Director of Endoscopic Services for the Winnipeg Regional Health Authority, deprived him of patients, operating room time, the opportunity to provide services, and remuneration. Dr. Schneider also claims that Dr. Moffatt submitted a false and defamatory complaint

about him to the Winnipeg Regional Health Authority. Dr. Moffatt denies any wrongdoing and denies that Dr. Schneider has suffered any damage.

CHRONOLOGY OF THE LITIGATION

[3] The following is a chronology of the litigation:

- December 11, 2019 - the plaintiffs filed their statement of claim;
- January 20, 2020 - the defendant filed his statement of defence;
- February 19, 2021 - the defendant served his affidavit of documents;
- December 23, 2022 - the plaintiffs filed and served a pre-trial brief, and requested dates for a pre-trial conference;
- March 7, 2023 - a pre-trial conference proceeded and trial dates were set for February 18 - March 7, 2025. The pre-trial Judge directed that examinations for discovery be completed by January 31, 2024;
- March 7, 2023 - the defendant requested the plaintiffs' affidavit of documents. At the pre-trial conference convened on March 7, 2023, the parties were under the misapprehension that the plaintiffs had served their affidavit of documents on the defendant. Through correspondence following the pre-trial conference, initiated by the defendant, it was determined that this was an error and that the plaintiffs' affidavit of documents had not yet been provided. Although the defendant requested the plaintiffs provide their affidavit of documents, this was not done;
- December 8, 2023 - the plaintiffs requested the defendant's availability for examinations for discovery. Counsel for the defendant did not respond to this

request, and takes the position that, in the absence of the plaintiffs' affidavit of documents, examinations for discovery could not be conducted;

- January 25, 2024 - a pre-trial conference proceeded before me, and I granted leave to the defendant to file this motion to dismiss the action for delay.

ANALYSIS

[4] The defendant sought dismissal of the plaintiffs' claim pursuant to Rule 24 of the Court of King's Bench Rules, M.R. 553/88. Under that Rule there are two routes to dismissal.

[5] Under Rule 24.01(1) the court has the authority to dismiss an action if there has been delay that has resulted in significant prejudice to a party. Where the delay is found to be inordinate and inexcusable, absent evidence to the contrary, significant prejudice is presumed (Rule 24.01(2)). Inordinate and inexcusable delay is defined as being in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case (Rule 24.01(3)).

[6] Under Rule 24.02, the court must dismiss an action for delay if three or more years have passed without a significant advance in the action, unless one of the listed exceptions applies.

ISSUES

[7] I will address the issues in this case as follows:

i) Have three or more years passed without a significant advance in the action such that the action must be dismissed pursuant to Rule 24.02?

ii) If so, do any of the exceptions listed in Rule 24.02 apply?

iii) Has there been inordinate and inexcusable delay such that the action may be dismissed pursuant to Rule 24.01?

i) Have three or more years passed without a significant advance in the action such that the action must be dismissed pursuant to Rule 24.02?

[8] The time period relied on by the defendant is that between January 20, 2020, when the statement of defence was filed, and January 25, 2024, when the second pre-trial conference occurred and leave was granted to file this motion. This is a period of just over four years.

[9] The defendant took the position that the three-year period to be considered must be the three years immediately preceding the date the defendant filed this motion. I do not agree. As stated by Simonsen JA in ***Buhr v Buhr***, 2021 MBCA 63 (***Buhr*** (CA)), Rule 24.02 is triggered once any three-year period has passed without a significant advance in the action (at para. 52).

[10] The issue here is whether three years elapsed without a significant advance in the action.

[11] In this case, the plaintiffs argued that when they filed their pre-trial brief and requested to schedule a pre-trial conference in December 2023, this constituted a significant advance in the action. There is support in the caselaw for the plaintiffs' position.

[12] In ***Rempel v. Gentek***, 2022 MBQB 128, it was held that the filing of a pre-trial brief constituted a significant advance in the action. In her decision, McCarthy J. stated that in her view the preparation and filing of a pre-trial brief would almost always be a

significant step in the litigation process. As she points out, in Manitoba, a date for a trial or summary judgment motion can only be set at a pre-trial conference. As she states, generally at a pre-trial conference, direction is given regarding the completion of various steps required to have the matter ready for trial (***Rempel***, at para. 23).

[13] Other Manitoba decisions have referred to setting a pre-trial conference date as a step available to a litigant to move an action closer to trial, and on that basis to be considered a significant advance in the action (***Fehr et al. v. Manitoba Public Insurance Corporation et al.***, 2019 MBQB 64, at para. 21; ***Buhr v. Buhr***, 2020 MBQB 107, at paras. 10, 15).

[14] In Alberta, as well, a pre-trial conference that results in a direction of the Court or a court memorandum has been held to be a step that materially advances an action. (***Courtoreille v. Edmonton (City)***, 2008 ABCA 90.) Whereas a pre-trial conference that does not address or resolve outstanding procedural steps has been held to be a step that does not materially advance the action (***Donnelly v Brick Warehouse Corp***., 2013 ABQB 621).

[15] To determine whether, in this case, scheduling a pre-trial conference constitutes a significant advance requires a functional analysis as explained by Spivak JA in ***WRE Development Ltd v Lafarge Canada Inc***, 2022 MBCA 11, as follows:

> [19] Determining whether a step significantly advances the action requires a functional approach (see *Buhr* at para 71). The court must view the whole picture of what transpired in the three-year period framed by the real issues in dispute and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors, including the nature, value and quality, genuineness and timing of the step at issue and whether that step moved the lawsuit forward in a meaningful way in the context of the action [citations omitted]. The focus is on the substance of the step taken and its effect on the litigation rather than its form [citations omitted].

[16] Pre-trial conferences can take many forms, with a range of outcomes. Whether a pre-trial conference constitutes a significant advance depends on the circumstances of the case. In this case, by filing a pre-trial brief, the plaintiffs satisfied a prerequisite for scheduling the first pre-trial conference in the action. This first pre-trial conference, in turn, is a prerequisite for setting dates for the trial of the action.

[17] Under Rule 50.04, the judge before whom a pre-trial conference is to proceed performs a screening function to ensure that the matter is ready for a pre-trial conference. The judge has discretion to direct that the pre-trial conference not proceed if it is not appropriate to hold it at that time. In this case, the pre-trial conference did proceed, and trial dates were secured. A deadline for completing examinations for discovery was set.

[18] The defendant pointed out that the plaintiffs' pre-trial brief was filed just before the expiry of the three-year long delay period. The plaintiffs did not take issue with the defendant's assertion that the first pre-trial conference was scheduled at that time because the three-year period was about to expire. The defendant argued that the plaintiffs should not be permitted to re-start the three-year delay clock on this action simply by setting the matter for a pre-trial conference.

[19] The defendant further alleged that the plaintiffs have deliberately delayed this action in favor of pursuing a separate, but related, claim: Schneider et al. v Targownik (CI19-01-25075). (The related action has proceeded through pre-trial steps and was set to proceed to trial in December 2023, but the trial was adjourned because the trial judge became unavailable.)

[20] It does appear that the plaintiffs have filed two related lawsuits, and pursued each differently. However, in my view, this does not mean that the plaintiffs' setting this action down for a pre-trial conference was disingenuous or done for an oblique motive, and therefore should be discounted as suggested by the defendant. I disagree with the defendant's suggestion that the plaintiffs were merely re-starting the clock. Rather, the imminent expiry of the three-year period prompted the plaintiffs to take a necessary step to move the action towards its ultimate disposition. Although many issues regarding the conduct of the trial remained to be determined, this was not a pre-trial conference that resulted in no advance of the action. Trial dates were set, and a deadline was set for the completion of examinations for discovery.

[21] It is true that following the pre-trial conference, little progress was made towards preparation for trial. As noted above, at the first pre-trial conference both parties were under the misapprehension that affidavits of documents had been exchanged. The error regarding the plaintiffs' affidavit of documents was identified by the defendant's counsel shortly after the pre-trial conference. The defendant's counsel made requests of the plaintiffs for their affidavit of documents on March 7, 2023 and on March 8, 2023. From the correspondence, there appears to have been some genuine confusion about whether the affidavit had been produced. The plaintiffs' counsel indicated that they would take steps to produce it but failed to do so. The defendant did not follow up and took no further steps.

[22] The parties had no further communication until December 8, 2023, when counsel for the plaintiffs wrote by email to counsel for the defendant seeking to schedule

examinations for discovery. At that point, the January 31, 2024 deadline for completion of examinations for discovery was looming. Counsel for the defendant did not respond. Examinations for discovery were not conducted. Counsel for the defendant says that there was no point proceeding with examinations for discovery without the plaintiffs' affidavit of documents, but there is no indication that this concern was communicated to counsel for the plaintiffs.

[23] Clearly, it is the responsibility of the plaintiffs to prosecute their claim, and the plaintiffs must be vigilant in their effort to advance their action (***Buhr***, at para. 12). A defendant is not required to attempt to move the action forward. However, a defendant must not intentionally obstruct, stall or delay an action (***Buhr*** (CA), at para. 82). In my view, both parties bear some responsibility for the delay in proceeding with examinations for discovery. That the examinations did not proceed by the deadline does not render the pre-trial conference meaningless.

[24] Setting a first pre-trial conference in an action results in the assignment of a pre-trial judge who, pursuant to Rule 50.05, is responsible for managing the pre-trial conduct of the action, and has broad powers to make orders or give direction considered necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of the action. These powers may be invoked by any party to the litigation, or by the judge on their own motion, to move the action forward to disposition.

[25] As a result of the plaintiffs' filing of the pre-trial brief and scheduling the pre-trial conference, trial dates were set, a deadline was set for the completion of examinations

for discovery, and the Court's pre-trial management mechanisms were engaged. I find that this was a step that moved the lawsuit forward in a material way and so was a significant advance in the action under Rule 24.02(1).

ii) Do any of the exceptions listed in Rule 24.02 apply?

[26] Given my conclusion above, it is unnecessary to address the plaintiffs' arguments involving the exceptions found in Rule 24.02(1)(c), (d) and (e) to prevent dismissal of the action. However, in the event that I am wrong in my conclusion, I would make the following observations.

[27] The direction I gave at the pre-trial conference on January 25, 2024, for the delivery of the plaintiffs' affidavit of documents by February 2, 2024, cannot be characterized as an extension of time as contemplated by Rule 24.02(1)(c). Nor can it be said that the delay in moving the action forward was provided for as the result of a pre-trial conference as contemplated by rule 24.02(1)(d).

[28] However, I conclude that the defendant's participation in the March 7, 2023 pre-trial conference would warrant application of Rule 24.02(1)(e). Application of that exception to the long delay rule is explained by Edmond J. in ***Fehr***:

> [26] A plain reading of the exception set forth in Queen's Bench Rule 24.02(1)(e) requires the court to determine the following:
>
> > i. The step taken by the plaintiffs must be a motion or other proceeding;
> > ii. The proceeding in this case, the appraisal process, must have occurred since the delay;
> > iii. The defendants must have participated in the proceeding; and
> > iv. The defendants' participation must be for a purpose and to the extent that warrants the action continuing.
>
> [27] Before I analyze each of these four steps, it is important to understand the basis for this exception. Again, the Alberta courts in applying a similar rule have

> stated that an application for dismissal will be refused where the delaying party has done a "thing" to materially advance the action after the delay and the defendants agreed or participated in that advance in the action and thus acquiesced in the delay. The courts have found that where significant advances have been made and the parties have participated, it would unfair and inequitable to strike the action for delay (See *Trout Lake Store Inc.* and *Krieter v. Alberta*; 2014 ABQB 349, 590 A.R. 109 and *St. Jean Estate*).
>
> [28] The bottom line is that if a significant advance is made by the delaying party, and the defendants have actively participated in that action to an extent and degree that could lead the plaintiffs to fairly assume that the defendants have waived the delay, it is inappropriate to dismiss the action for delay….

[29] As noted above, I have found that the pre-trial conference of March 7, 2023 was a significant advance in the litigation, because trial dates were set, a deadline set for the completion of examinations for discovery, and mechanisms for the pre-trial management of the action were engaged. The defendant participated in the March 7, 2023 pre-trial conference. Although the defendant raised concerns about delay, and the fact that examinations for discovery had not been conducted, there is no indication that he objected to setting trial dates. In my view, the defendant's participation could have led the plaintiffs to fairly assume the defendant had waived delay.

iii) Has there been inordinate and inexcusable delay such that the action may be dismissed pursuant to Rule 24.01?

[30] The approach to be taken to the application of Rule 24.01 is explained by Burnett J. of the Manitoba Court of Appeal in ***The Workers Compensation Board v Ali***, 2020 MBCA 122, at paras. 39-43. Following this approach, I must consider if there has been delay, and if so, whether it has resulted in significant prejudice. Significant prejudice is presumed if the delay is found to be both inordinate and inexcusable. The defendant seeks to rely on this presumption.

[31] Generally, once inordinate delay is established, in the absence of a meaningful explanation for the delay in the particular circumstances of the case it will be considered inexcusable. To determine whether the delay is inordinate and inexcusable, I must consider whether the delay 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. I must consider: the subject matter of the litigation; the complexity of the issues between the parties; the length of the delay; the explanation for the delay; and any other relevant circumstances. This would include a consideration of the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay (***Ali***, at paras. 41-42).

[32] The subject matter of the litigation relates to Dr. Schneider's medical practice and allegations that the defendant deprived him of patients, operating room time, the opportunity to provide services, and remuneration. Dr. Schneider also claims that the defendant defamed him by way of an allegedly false complaint against him. There are both factual and legal issues to be determined. I would not characterize this action as complex, in that there are only the two parties and it seems unlikely that extensive expert opinion evidence will be required by either party. Having said that, nor is it a simple case.

[33] The plaintiffs argued that the length of delay in this case is simply not enough to justify a finding that it is inordinate and inexcusable. The plaintiffs point out that many cases resulting in dismissal for delay involve delays of in excess of five and sometimes more than 10 years. It is true that many of the cases dismissed for delay involved delays in excess of five years.

[34] I find that, while not ideal, the total delay in this action is not, on its face, exceedingly or unusually lengthy. The defendant pointed to what he argued is an obvious comparator case; that is, Schneider et al. v. Targownik. That case is a reasonable comparator because it raises similar issues to those raised in this action. As noted above, that case proceeded through examinations for discovery, pre-trial conferences and pre-trial motions, and the trial was to proceed in December 2023. In comparison, this action is now set for trial commencing in February 2025 and has seen only limited progress towards resolution or adjudication. Had the comparator case proceeded as scheduled, it would have been completed in just under four years from the close of pleadings. Assuming this action proceeds to trial as scheduled, it will be completed in just over five years, a difference of just over a year. When I compare the progress of the comparator case and that of this action, I cannot find that the difference is "so large as to be unreasonable" (***Ali***, at para. 66).

[35] The evidence filed shows lengthy periods of time with little or no activity in this action. In particular, as discussed above, almost three years passed from the close of pleadings to the first pre-trial conference when trial dates were set. The plaintiffs offered no explanation for the delay and conceded that they chose to pursue the action against Dr. Targownik as a priority. However, there is no evidence that the defendant raised concerns about the delay, nor did he take steps to prompt the plaintiffs to advance the claim or to schedule a pre-trial conference. Certainly, it is for the plaintiffs to prosecute their claim, but the defendant's inaction cannot be irrelevant to my assessment.

[36] I have already stated that, in my view, both parties bear some responsibility for the failure to complete examinations for discovery by the deadline ordered at the first pre-trial conference. The parties had 10 months within which to complete the examinations, and they failed to do so. However, this failure has not resulted in a delay of the trial, at least not yet.

[37] In the final analysis, while not a model of efficiency, I find that the delay is not inordinate and inexcusable. The presumption of prejudice does not apply and the evidence filed does not establish significant prejudice to the defendant resulting from the delay.

Conclusion

[38] The defendant's motion is dismissed. Costs may be spoken to if not agreed.

______________________________J.