Date: 20240227
Docket: CI 18-01-12293
(Winnipeg Centre)
Indexed as: River Ridge 2 Facility Inc. v.
Manshield Construction LP et al.
Cited as: 2024 MBKB 38

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

RIVER RIDGE 2 FACILITY INC.,	)	Gregory M. Fleetwood
	)	Kelsey L. Schade
plaintiff,	)	for the plaintiff
	)	
-and-	)	Kevin T. Williams
	)	Matthew Nordlund
MANSHIELD CONSTRUCTION LP, MAN-SHIELD CONSTRUCTION, MAN-SHIELD CONSTRUCTION by its General Partner 5369917 MANITOBA LTD., 5369917 MANITOBA LTD. and INTACT INSURANCE COMPANY,	)	for the defendants
	)	Jonathan M. Woolley
	)	Kosta L. Vartsakis
	)	for the third parties
defendants,	)	
	)	
-and-	)	
	)	
IBI GROUP ARCHITECTS (CANADA) INC., IBI GROUP INC. and IBI GROUP CONSULTANTS LTD.,	)	
	)	Judgment Delivered:
third parties.	)	February 27, 2024

BOND J.

INTRODUCTION

[1] In a decision released on March 24, 2023 (***River Ridge 2 Facility Inc. v. Manshield Construction LP et al***, 2023 MBKB 61), Senior Master Clearwater (as she then was), held that the plaintiff's claim should be dismissed for delay, pursuant to Rule 24.02 of the Court of King's Bench Rules, M.R. 553/88. The plaintiff appeals that decision.

[2] The nature of the appeal is a fresh hearing. Senior Master Clearwater's reasons may be taken into consideration, but no deference is owed (see ***Krasulja v. Manaigre***, 2021 MBQB 131, at para. 5).

[3] The plaintiff's statement of claim was filed on January 10, 2018. There is no dispute that three or more years have passed without a significant advance in the action. The central issue is whether an exchange of emails between counsel for the parties on May 30, 2018 constituted an agreement to delay as contemplated in Rule 24.02(1)(a).

[4] For the reasons that follow, I would grant the appeal. The plaintiff's claim should not be dismissed for delay because the parties expressly agreed to the delay.

BACKGROUND

[5] Briefly, the plaintiff's claim against the defendants relates to a contract entered into by the plaintiff and defendants in 2014 for the construction of a retirement residence. The plaintiff says that the defendant construction company failed to complete the work as contracted, and that the defendant insurance company failed to comply with its

obligations under a performance bond. The third parties acted as consultants for the project. The plaintiff claims damages to be in the range of $5.6 to $9 million. The defendants deny liability and claim against the third parties for indemnity or contribution.

CHRONOLOGY OF THE LITIGATION

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

- January 10, 2018 – statement of claim filed;
- March 9, 2018 – statement of claim amended;
- March 14, 2018 - amended statement of claim served on the defendants;
- April 22, 2018 – defendant served a request for particulars and request to inspect on the plaintiff;
- May 10, 2018 – the plaintiff provided a response to the request for particulars and request to inspect;
- May 29, 2018 - the defendants served a copy of their statement of defence and counterclaim on the plaintiff;
- May 30, 2018 – the exchange of emails between counsel for the plaintiff and counsel for the defendants that is in issue in this case occurred.
    - In that exchange, counsel for the plaintiff admits service of the defendants' statement of defence and counterclaim and indicates he is seeking instructions for the reply and defence to counterclaim that he is preparing and intending to

file. He then states: "…I trust you will not note my client in default without giving reasonable notice of your intention to do so…."

- Counsel for the defendants replies with: "It is agreed that I will not note your client in default without giving you a reasonable notice of my intention to do so."

- July 17, 2018 – the defendants filed a third-party claim against the consultants on the project;
- November 21, 2018 – The third parties filed their defence;
- January 26, 2022 - The defendants moved to dismiss the action for delay; and
- February 8, 2022 - The third parties moved to dismiss the third-party claim for delay.

[7] Rule 24.02 presumes a claim will be dismissed for delay if more than three years has passed without a significant advance in the action unless one of five exceptions applies. The exception in issue here is found in Rule 24.02(1)(a): unless "all parties have expressly agreed to the delay."

[8] Rule 24.02 came into force on January 1, 2018. It was, however, subject to a transitional period whereby it would be applicable only to a motion to dismiss for delay brought after January 1, 2019.

[9] In this case, the statement of claim was filed 10 days after Rule 24.02 came into force, and the email exchange occurred approximately six months after it came into force.

Both occurred before the expiry of the transitional period. The defendants' motion to dismiss for delay was filed about three years and seven months after the email exchange.

Plaintiff's Position

[10] The plaintiff argued that the email exchange of May 30, 2018 constituted an express agreement to delay. The plaintiff argued that because the purported agreement arose in 2018, it should be viewed through a 2018 lens. That is, Rule 24.02 had only recently come into force and the guidance regarding an express agreement for delay provided by the Court since that time had yet to be delivered. The plaintiff further argued this case is indistinguishable from Greenberg J.'s decision in ***Krasulja*** where a similar email exchange was held to constitute express agreement to delay.

Defendants' Position

[11] The defendants argued that the circumstances of this case are different from ***Krasulja***. They highlighted the language of the email exchange in issue, which they say does not evidence a broad agreement to delay. They also pointed to the evidence of Mr. Guiseppe Bova, a representative of the plaintiff. They say that in cross-examination Mr. Bova acknowledged that the email exchange in issue did not specifically refer to an agreement to delay the action. They also emphasized the broad proportionality principles underlying the new Rule.

Third Parties' Position

[12] In her decision, Senior Master Clearwater held that the third-party claim of the defendants was deemed dismissed by operation of Rule 24.05. The plaintiff objected to the third parties' participation in the appeal hearing because no appeal had been filed in

relation to the decision to dismiss the third-party claim. However, clearly the third parties had an interest in the litigation, and I was prepared to hear from them. Obviously, overturning Senior Master Clearwater's decision means that the plaintiff's claim continues, and Rule 24.05 no longer applies.

ANALYSIS

[13] Whether the agreement contained in the May 30, 2018 email exchange satisfies the exception found in Rule 24.02(1)(a) is to be determined based on the facts and circumstances of the case (see ***Krasulja*** at para. 34).

[14] An express agreement to delay need not be in any specific form and need not be a formal written contract. The question is whether the email exchange evidences a clear intention to delay proceedings (see ***Krasulja*** at paras. 32-33).

[15] Agreements that pre-date the application of the new Rule must be interpreted with some regard to past practice (see ***Krasulja*** at para. 35; ***Knight v. Daraden Investments Ltd. et al.***, 2021 MBQB 279, at para. 24).

[16] In ***Krasulja***, at para. 29, counsel for the defendant stated in an email to counsel for the plaintiff: "…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." Greenberg J. found this to be an express agreement to delay. I do not see a significant difference between the language of that agreement and the language in the email exchange before me. Like in ***Krasulja***, the agreement evidenced in the email exchange would have precluded the defendants from noting the plaintiff in default. Like in ***Krasulja***, I find that

it would be reasonable that the plaintiff would assume that the defendants not only would not note it in default, but also would not seek to dismiss the claim for delay without further notice (see ***Krasulja*** at para. 34).

[17] The words of the purported agreement must be considered in the context of the surrounding circumstances. This litigation arises out of a large multimillion dollar construction project. The evidence before me indicates that the plaintiff had been taking steps to obtain expert reports regarding alleged deficiencies in the construction. Although any reports that were obtained had not yet been shared with the defendants, it is not the case that the plaintiff was simply sitting on its hands. The delay allowed the plaintiff time to prepare for the litigation without the looming threat of a motion to dismiss for delay.

[18] In ***Knight***, Bock J. held that an agreement between counsel that "…no Statement of Defence is required at this time" was an express agreement to delay the action for the purposes of Rule 24.02. Bock J. followed ***Krasulja*** and considered that the agreement had predated the new Rule. He also considered that both plaintiff and defendant benefited from the delay to which they had agreed (see ***Knight***, at para. 20).

[19] In her decision, Senior Master Clearwater distinguished ***Krasulja*** and ***Knight***. First, she focused on the evidence of Mr. Bova who, she found, acknowledged in cross-examination that he understood that the agreement between the parties only related to the filing of the defence to the counterclaim. With respect, in my view, Mr. Bova's answers in cross-examination were not so clear. On my reading of the cross-examination, Mr. Bova merely acknowledged that the May 30, 2018 email exchange did not include specific reference to an agreement to delay the claim. It was not an

admission that the parties had not agreed to delay the claim. Rather, Mr. Bova stated that it had been his understanding that "…there was an agreement in place for an extension and that there would be no default declared without proper notification by either side." (Transcript of Cross-Examination, dated November 16, 2022, at p. 7, lines 7-10.) This is consistent with Mr. Bova's statement in his affidavit, sworn September 30, 2022 (at para. 27), to the effect that based on the extension provided by the defendants "…we were not faced with any threatening or imminent timelines…".

[20] Second, Senior Master Clearwater found that the language of the agreement in ***Krasulja*** was more encompassing and broader than in this case. Again, with respect, I do not find that inclusion of the word "indefinite" in relation to the extension of time for filing the defence to counterclaim to be significant. In both cases, the defendants were precluded from noting the plaintiff in default.

[21] Further, Senior Master Clearwater distinguished this case from both ***Krasulja*** and ***Knight*** on the basis that the statement of claim in this case had been filed after the new Rule had come into force, albeit in the transitional year. She held: "…If the plaintiff was expecting or desiring a 'standstill agreement' on these facts, and given the timing of the litigation, it ought to have sought a more clear, direct and express agreement than the one they received." (***River Ridge*** at para. 38). Her finding is in keeping with the comments made in ***Krasulja*** (at para. 35) and ***Knight*** (at para. 24) to the effect that with the Rule now in place, counsel would be prudent to turn their minds to Rule 24.02(1)(a) and specifically address it in any agreement to delay proceedings.

[22] However, in my view, I must look not only at the timing of the filing of pleadings but also consider that at the time of the email exchange, the new Rule had been in place just six months, and ***Krasulja*** and ***Knight*** had not yet been decided. The guidance those cases now offer to the effect that prudence would dictate a more clear and explicit agreement between counsel had not yet been delivered. Considering the language of the email exchange in this case, in the context of the litigation, the defendants are agreeing not to hold the plaintiff to the strict application of the Rules for pleadings. It is reasonable that the plaintiff assumed that the defendants would not seek to dismiss its claim for delay. This case is indistinguishable from ***Krasulja***.

[23] In coming to this conclusion, I acknowledge the principle of proportionality and the importance of timely access to justice in civil cases that may be enhanced by weeding out inactive cases (see ***River Ridge*** at para. 18). I agree with Senior Master Clearwater that these principles should animate the court's application of the Rules related to delay and its consideration of applications to dismiss for delay. However, in my view, the assessment of whether "all parties have expressly agreed to the delay" comes down to the interpretation of the words of the agreement between the parties in the context of the litigation in issue and the parties' dealings with one another.

[24] To be clear, I agree with comments in ***Krasulja*** and ***Knight***, echoed in Senior Master Clearwater's comments in ***River Ridge***, to the effect that counsel must now turn their minds to whether their agreements to delay steps in litigation amount to an express agreement to delay as contemplated by Rule 24.02(1)(a). Their agreements - whether

to delay or not - should be express, clear and explicit, to avoid unnecessary litigation regarding their interpretation.

Third-Party Claim

[25] Clearly, my conclusion means that Rule 24.05 no longer operates to dismiss the third-party claim. On that basis alone, the third-party claim should not be dismissed. Further, to reverse the decision regarding the claim's dismissal but to refuse to do so regarding the third-party claim, would be unjust to the defendants. The absence of an appeal of the third-party claim's dismissal should not stand in the way of a just result.

CONCLUSION

[26] I conclude that the parties expressly agreed to the delay and that therefore the exception found in Rule 24.02(1)(a) applies. The plaintiff's appeal is granted and its claim is not dismissed. The defendants' third-party claim is not dismissed.

_____J.