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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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	)	Counsel for the plaintiff
- and -	)	
	)	
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defendant.	)	Counsel for the defendant
	)	
	)	Judgment delivered:
	)	June 15, 2023

MASTER GOLDENBERG

INTRODUCTION

[1] The plaintiff filed a statement of claim on January 17, 2019, alleging wrongful dismissal. The defendant filed and served a statement of defence on February 28, 2019. An affidavit of documents of the plaintiff was served on counsel for the defendant three years and seven days later, on March 7, 2022. On April 1, 2022, the defendant brought the within motion to dismiss the action for long delay. When the defendant brought the motion, it had not served its affidavit of documents. The main issue to be addressed on

the motion is whether the defendant's failure to serve its affidavit of documents should preclude the dismissal for delay.

PROCEDURAL MATTERS

[2] Following the hearing on the motion, but before these reasons were issued, the Court of King's Bench released some additional decisions on motions to dismiss for delay. Counsel agreed to a process whereby both parties could make written submissions regarding some of those additional authorities.

THE LAW

[3] The motion was brought pursuant to Rule 24.02 of The Court of King's Bench Rules, M.R. 553/88 ("the Rules"). Rule 24.02 provides in part as follows:

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

[4] In addition to Rule 24.02, the plaintiff relies upon Rule 30.08 and Rule 1.04 to support his position that the motion to dismiss for long delay should be dismissed. Rule 30 provides in part as follows:

> **Party to serve affidavit**
> 30.03(1)
> A party to an action shall, within 10 days after the close of pleadings, serve on every other party an affidavit of documents in Form 30A or 30B disclosing to the full extent of the party's knowledge, information and belief all relevant

documents that are or have been in the party's possession, control or power; and the affidavit shall sufficiently identify the documents.

Failure to serve affidavit or produce document
30.08(2)
Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order, including a contempt order, as is just. (emphasis added)

[5] Rule 1.04 provides in part as follows:

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.

ANALYSIS

[6] The defendant takes the position that there has been long delay pursuant to Rule 24.02, the result of which is that the court must dismiss the action. In particular, it says that more than three years have passed since a significant advance in the action and that none of the exceptions set out in Rule 24.02(1) apply. The plaintiff agrees that there have been more than three years without a significant advance in the action and that none of the exceptions to the Rule apply. Nevertheless, the plaintiff says that the court has a residual discretion under the long delay rule to not dismiss for long delay where, as here, the defendant is in breach of its procedural obligations. In this case, because the

defendant is in breach of its obligation to serve its affidavit of documents, the plaintiff says it should not be permitted to seek to dismiss the action for delay. In particular, the plaintiff argues that this residual discretion should be exercised, in this case, because if the defendant had complied with its obligation, the compliance itself would, in all likelihood, have been a significant advance in the action.

[7] The plaintiff takes the position that the court has this residual discretion under Rule 24.02 and, in addition, or the alternative, that the court also has discretion under Rule 30.08(2). Rule 30.03(1) obligates all parties to an action to serve an affidavit of documents within ten days after the close of pleadings. It provides the court with remedial discretion when a party fails to comply with that obligation. The plaintiff submits that dismissing a motion for long delay brought by a delinquent party is one of the many remedies available to the court under Rule 30.08(2)(c).

[8] The Court of Appeal considered Rule 24.02 in ***Buhr v. Buhr***, 2021 MBCA 63 ("***Buhr***"). The plaintiff submits that the existence of a residual discretion, notwithstanding the language of Rule 24.02(1), was not a live issue in that case at the Court of Appeal or before Justice Bock at first instance. The plaintiff argues that because the Court of Appeal in ***Buhr*** did not address the issue of residual discretion, the issue can still be considered in the present case. In ***Buhr***, there was no issue of a moving party being in breach of a rule, whereas, in this case, the defendant was in breach of its obligation to serve its affidavit of documents.

[9] The defendant disagrees that there is a residual discretion in Rule 24.02. It points to the mandatory wording of Rule 24.02 and to Manitoba case law, including ***Buhr***, which it submits makes it clear that there is no discretion. In the alternative, the defendant argues that if I find a residual discretion under Rule 24.02 or a remedial discretion under Rule 30.08(2), this is not a case where I should exercise my discretion in favour of the defendant.

[10] In Ontario, parties that seek to dismiss an action for delay under their Rule 24 can only do so if they are not in default under the rules. Rule 24.01 of the Ontario Rules of Civil Procedure provides in part as follows:

> **RULE 24 - DISMISSAL OF ACTION FOR DELAY WHERE AVAILABLE**
> Rule 24.01
> 24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,
> (a) to serve the statement of claim on all the defendants within the prescribed time;
> (b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;
> (c) to set the action down for trial within six months after the close of pleadings; or
> (d) Revoked.
> (e) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off. (emphasis added)

[11] Therefore, in Ontario, the Rules of Civil Procedure expressly provide that a defendant in default of its obligations under the rules cannot seek an action be dismissed for delay. The Manitoba Rules do not have such a condition precedent. The plaintiff relies on some Ontario case law to support its position on residual discretion. Given the difference in wording in our Rules, these cases are of limited value.

[12] In ***Buhr***, the Court of Appeal refers to the mandatory nature of the Rule as follows at paragraphs 34 and 35:

> **34** The word "must" in r 24.02(1) is imperative (see ***The Interpretation Act***, CCSM c I80 at section 15). This Court, in ***Steinmann v Kotello***, 2012 MBCA 30, accepted the following explanation given by Ruth Sullivan, ***Sullivan on the Construction of Statutes***, 5th ed (Markham: LexisNexis, 2008) at 74, about terms such as "shall" or "must" (at para 17):
> . . .
> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it. . . .
> . . .
> **35** Consistent with this, Alberta jurisprudence regarding its long-delay rule, which also uses the word "must", makes clear that dismissal is mandatory if there has been no significant advance in an action for three or more years and none of the exceptions apply (see *Ro-Dar* at para 12; *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 10; *Altex International Heat Exchanger Ltd v Foster Wheeler Limited*, 2018 ABQB 620 at para 93; *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 at para 62, leave to appeal to SCC refused, 38939 [2019] S.C.C.A. No. 436 (16 April 2020); and *Alderson v Wawanesa Life Insurance Company*, 2020 ABCA 243 at para 12 (*Alderson CA*)).

[13] Subsequently, Martin J. in ***Knutson Building Ltd. v. Winnipeg Environmental Remediation Inc.***, 2022 MBQB 119, relied upon the Court of Appeal's statement in ***Buhr*** that the use of the word "must" in Rule 24.02(1) makes dismissal mandatory (see paragraph 30).

[14] Despite these authorities, the plaintiff argues that there is still some residual discretion. He relies on the Alberta case of ***Turek v. Oliver***, 2014 ABCA 327, a case not referred to in ***Buhr***. In ***Turek***, the Alberta Court of Appeal confirmed that the court retains the discretion to dismiss a motion for long delay in appropriate circumstances, such as inaction by the moving defendants. In that case, the Court of Appeal held as follows at paragraphs 5 and 6:

> **5** The drop dead rule, R. 4.33, is designed to bring an end to actions that have become inactive and should be deemed to have been abandoned. It was not unreasonable for the chambers judge to conclude that this action does not fall within that category. The respondent had persistently pursued production of the appellants' affidavit of records, a document required by the *Rules of Court*. It was the appellants who were in default throughout, both of the *Rules* and their undertakings. The appellants argue that obtaining an agreement from opposing counsel that something will be done by a particular deadline does not significantly advance the action, unless that agreement is performed. This seems to imply that it is unreasonable, foolish or naïve for one barrister to rely on the undertaking of another.
> **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.

[15] In addition to the Ontario cases that refer specifically to the Ontario rule with the condition precedent of not being in default, the plaintiff relies on one additional Ontario authority to suggest that there is still residual authority that extends beyond the specific wording of the rule. In ***Greslik v. Ontario Legal Aid Plan***, [1988] O.J. No. 525|65 O.R. (2d) 110, the Ontario Divisional Court held that this discretion also extends to the nature of the obligation itself and not just the extent of compliance with it:

> **6** In our view when the drafters of the new rules used the words "not in default" in rule 24.01, they intended those words as a condition that must be satisfied before a defendant could launch a motion to dismiss, but those words cannot and should not be read to take away the jurisdiction of the master to exercise his discretion to dismiss such a motion where it appears that a defendant, although perhaps not in technical default of any specific rule or rules, has been dilatory in complying with undertakings and has ignored requests for compliance over a lengthy period of time. That is this case and in this case the master correctly, in our view, exercised his discretion in the circumstances before him.

[16] The plaintiff argues that this court should likewise have the residual discretion to dismiss a motion where a defendant is non-compliant with something like responding to undertakings or, as here, the obligation it had to file its affidavit of documents.

[17] The plaintiff relies upon some Manitoba authorities emphasizing the importance of a party's obligation to provide its affidavit of documents. In ***Ilse v. Ilse***, 2001 MBQB 127, at paragraph 14, Senior Master Goldberg (as she then was) stated:

> **14** The rules pertaining to the discovery of documents are intended to ensure full disclosure early in the proceedings, i.e. within ten days after the close of pleadings. To this end there is no longer a requirement to request the opposing party's affidavit of documents. The obligation to serve the affidavit of documents occurs automatically within a relatively short time frame after the close of pleadings. The obligation exists whether or not interim motions are pending, and whether or not cross-examinations are scheduled.

[18] In ***Biomedical Commercialization Canada Inc. v. Health Media Network Inc.***, 2018 MBQB 188, Greenberg J. dismissed a party's request to strike a statement of defence for failing to disclose relevant documents in a timely way. In doing so, Greenberg J. found as follows at paragraph 10:

> **10** Rule 30.08 of the Queen's Bench Rules gives the court authority to "make such order as is just" where a party fails to disclose a document in an affidavit of documents. In my view, this Rule allows the court to grant a remedial order not just where a party fails to disclose but also where a party delays disclosure and NRC did not dispute this. The issue is whether a remedial order or sanction is warranted in this case and, if so, what the nature of the order should be.

Greenberg J. reviews other authorities and notes that striking a pleading is an exceptional remedy that should be reserved for the most extreme cases of non-compliance with the Rules.

[19] In this case, the plaintiff argues that dismissing a motion brought by a delinquent party is one of the many remedies available under Rule 30.08(2)(c). Such remedial action would not be as extreme as striking out a statement of defence. However, it would be an appropriate remedy in the present case where the defendant has failed to comply with its procedural obligation. He argues that a defendant required to take a step that is

generally a significant advance – such as the delivery of an affidavit of documents – should not be permitted to benefit from its failure to comply with its mandatory obligations under the Rules. The plaintiff says that finding otherwise encourages defendants to be delinquent in their obligations by rewarding them for failing to take steps that are significant advances required by the Rules.

[20] Further, while the plaintiff does not assert that the defendant, in this case, engaged in such an "ambush" that existed in the ***Turek*** case, he does assert that the existence of such a residual discretion is nevertheless available and important when the court is confronted with such a case. The plaintiff argues that dismissing a motion for non-compliance is not an exceptional remedy and is consistent with the Ontario approach and Court of King's Bench Rule 1.04 relating to proportionality. The plaintiff argues that, in this case, dismissing the motion is the most proportionate and appropriate remedy available under Rule 30.08(2).

[21] In addition to the ***Knutson*** decision that the plaintiff had referred to in his brief, counsel also made submissions on the decision of ***Forsythe v. Castelane***, 2023 MBKB 18, a more recent decision of Martin J. I note that leave to appeal has been sought on ***Forsythe***, with motions returnable in August 2023.

[22] The plaintiff submits that the decision in ***Forsythe*** related to defence conduct is relevant to the case at bar and supports the dismissal of the defendant's Rule 24.02 motion. Conversely, the defendant submits that the decision is distinguishable and, therefore, not relevant to the case at issue. Both parties made submissions concerning paragraphs 31, 32, and 44 of Martin J.'s decision which are as follows:

> **31** I only point to these comments, to caution generally that any counsel may wish to reconsider the "sleeping dog" or "laying in the weeds" tactic of sitting still and quiet in response to answers to undertaking they view as deficient. In a sense, providing the answers puts the onus on the receiving party to either accept them, usually through acquiescence, or to object and take one of several available steps to address their concern. Modern civil procedure should be conducted to harmonize, as best possible, the sometimes dueling objectives of penalizing tardy litigation and ensuring essential justice is done. Waiting three years to complain about answers to undertaking is inconsistent with both objectives.
>
> **32** While KBR 24.02(1) does not require a defendant to complain about the quality of answers to undertakings before advancing a motion to dismiss based on that rationale (***Buhr***, at para. 82), considering the totality of the answers in this instance, the more prudent action for defence counsel would have been to request or move for further and better answers to undertakings. While a defendant need not move a plaintiff's action along, and a functional analysis respecting answers to undertakings does not start with the presumption the answers are a significant advance, nonetheless, particularly where a plaintiff is representing herself in a serious action and obviously relying on the sufficiency of her answers, it behooves counsel, as a matter of courtesy and regard for the administration of justice generally, not to lay in the weeds looking for an opportunity to strike with KBR 24.02(1) as the weapon of choice.
>
> **. . .**
>
> **44** I accept that defence counsel are not obligated to push litigation along but, where veteran counsel employs a tactic, particularly with a self-represented party, that has the effect of lulling that party into a false sense of security and then springs the trap, a court should be loath to also play hard ball, except in compelling cases. The defendants are asking that Ms. Forsythe be denied her day in court, denied her opportunity for essential justice to be done by having her claim adjudicated, solely on a procedural ground, having no connection to the merits of the claim or any demonstrated prejudice. Further, there is a certain irony in this situation, in that it appears the defendants are also guilty of delay, albeit of a different nature, in that it took just shy of 36 months, from the filing of the motion on January 7, 2020 until it was heard in December 2022. No doubt there is some reasonable excuse that I am unaware of for some of that delay, but ultimately the delay is *prima facie* the moving parties' responsibility.

[23] Concerning paragraph 31, the plaintiff says that Martin J.'s caution applies following the close of pleadings. More specifically, his caution applies with greater force after the close of pleadings because defendants have a positive obligation under Rule 30.03(1) to deliver an affidavit of documents. In addition, the plaintiff says that waiting three years to complain that a plaintiff has not delivered an affidavit of documents is

inconsistent with modern civil procedure generally, as well as the objectives of penalizing tardy litigation and ensuring essential justice is done.

[24] Concerning paragraph 32 of that decision, the plaintiff notes that while Rule 24.02 may not require defendants to request a plaintiff's affidavit of documents, defendants are nonetheless required to produce their own under Rule 30.03(1). Further, the plaintiff argues that defendants that breach their positive obligation to deliver an affidavit of documents behave in a manner inconsistent with the proper administration of justice.

[25] Finally, concerning paragraph 44 of ***Forsythe***, the plaintiff notes that the failure of the defendant to deliver its affidavit of documents in the present case has the same effect of lulling a plaintiff into a false sense of security. He argues that the court should be extremely reluctant to "play hardball" if such a delinquent defendant moves under Rule 24.

[26] On the other hand, the defendant notes that paragraphs 31 and 32 deal with defence counsel's response to answer to undertakings that they view as unsatisfactory. Specifically, Martin J. speaks of situations where counsel does not communicate their view that answers to undertakings are deficient to the opposing party until filing a motion to dismiss for long delay. Given that no answers to undertakings were exchanged in the case at issue, the defendant argues that paragraphs 31 and 32 of ***Forsythe*** are irrelevant and should not be applied to the facts of this case.

[27] With respect to paragraph 44, the defendant notes that no actions were taken by the defendant in the present case that reasonable counsel could see as lulling the plaintiff into a false sense of security. In this case, the plaintiff is represented by legal counsel

who ought to have known the effect of the long delay rule and should have known that it is the plaintiff's responsibility to move his action forward.

[28] Overall, the defendant states that ***Forsythe*** is distinguishable from the case at hand, as Martin J. was tasked with determining whether the production of answers to undertakings produced by the plaintiff during the three years of alleged delay constituted a significant advance in the action. In this case, however, no actions were taken during a three-year period of delay that can be considered to have advanced, let alone significantly advanced, the action.

[29] Having considered the parties' submissions and the case law relied upon, I am not persuaded that the court has residual discretion under Rule 24.02(1). ***Buhr*** and ***Knutson*** make clear that the language is mandatory. Unlike the Ontario legislation, which requires compliance with the Rules as a condition precedent, the Manitoba Rules contain no such condition precedent.

[30] As referenced in ***Knutson***, the Manitoba Rules contain various "safety valves," including a situation where parties expressly agree to the delay:

> [25] I pause to note that none of the exceptions under QBR 24.02(1) (a), (b), (d) or (e) apply in this situation. All the exceptions (a) – (e), along with the significant advance concept, act as safety valves, providing practical and pragmatic ways to relieve potential severity of the Rule.

[31] Manitoba courts have found express agreements in circumstances that might otherwise amount to the "ambushing" referred to in ***Turek***. In any event, the plaintiff acknowledges that the circumstances of this case are not comparable to ***Turek***. I also disagree with the plaintiff's assertion that the ***Forsythe*** decision supports dismissing the motion. Martin, J. found in ***Forsythe*** that there was a significant advance in the action

and, accordingly, no long delay. His analysis at paragraph 44 was part of his consideration of whether the action should be dismissed under Rule 24.01 based on presumed significant prejudice to a party based on inordinate and inexcusable delay to a party. After balancing all the relevant factors, he decided that the delay, in that case, was not inordinate and inexcusable. That analysis is not relevant to the analysis needed in this case relating to Rule 24.02

[32] If there was an intention by the drafters of Rule 24.02 that a defendant could only bring a motion to dismiss for long delay if it was itself in compliance with its procedural rules, that could have been stated in the Rule, as was done in Ontario. Nor do I find such an interpretation inconsistent with Rule 24.02 as a whole, Rule 1.04, or Manitoba case law. Any plaintiff, including the plaintiff in this case, clearly has tools available under the Rules to enforce non-compliance. In this case, the plaintiff could have brought a motion to compel the defendant to file its affidavit of documents at any time during the three years. Notably, the plaintiff had yet to file his affidavit of documents in the three years following the closing of pleadings.

[33] The plaintiff's argument that there is also a discretion available to the courts separately under Rule 30.08(2)(c) is interesting. However, given the specific and mandatory wording of Rule 24.02(1), and when long delay exists, I am not persuaded that the court has a remedial discretion to dismiss an action for long delay due to the moving party's failure to file an affidavit of documents under Rule 30.08(2)(c)

[34] Accordingly, I am not satisfied that I have any discretion under Rule 24.02 or 30.08(2)(c) to dismiss the motion for long delay. However, if I am wrong and have such discretion, I would not exercise it in the present case. My decision in that regard arises from the facts of the present case, namely, that the plaintiff had plenty of opportunity and tools available to it under the Rules to move the action forward but did not do so. Nor is this a case where any actions by the defendant could be construed as an ambush or to have lulled the plaintiff into a false sense of security. In this case, there is no pressing reason to exercise discretion not to allow a motion to dismiss for long delay.

CONCLUSION

[35] Rule 24.02(1) provides that the court must dismiss the action where three or more years have passed without a significant advance in the action unless any of the exceptions apply. The plaintiff agrees that three years passed without a significant advance on the action and that none of the exceptions apply in the present case. Accordingly, my decision is that the action must be dismissed for long delay

[36] If the parties cannot agree on costs, they may speak to the issue

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J. L. Goldenberg
Master