Date: 20240612
Docket: CI 21-01-33585
(Winnipeg Centre)
Indexed as: Normand v. St. Charles Interparochial School Inc. et al.
Cited as: 2024 MBKB 87

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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

BRIAN NORMAND, plaintiff,	)	Alyssa Cloutier for the plaintiff
- and -	)	
ST. CHARLES INTERPAROCHIAL SCHOOL INC, THE CITY OF WINNIPEG, THE GOVERNMENT OF MANITOBA, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, MISSIONARY OBLATE SISTERS OF SAINT BONIFACE INC., THE WORKS OF THE SISTERS OF SAINT-JOSEPH DE SAINT-HYACINTHE, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPLAE CATHOLIQUE ROMAINE DE SAINT BONIFACE, FATHER JOHN DOE AND SISTER JANE DOE, defendants.	)	Mark R. Frederick for the defendant, Missionary Oblate Sisters of Saint Boniface Inc. Judgment Delivered: June 12, 2024

INNESS J.

INTRODUCTION

[1] The Missionary Oblate Sisters of Saint Boniface (the "Sisters") (also referred to as the "defendant") bring this motion pursuant to Rule 49.09 of The Court of King's Bench

Rules, M.R. 553/88 (the "Rules"). Rule 49.09 allows a party to seek judgment on the terms of an accepted offer to settle where the other party to the agreement fails to comply with the settlement agreement.

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[2] Rule 49.09 reads as follows:

> FAILURE TO COMPLY WITH ACCEPTED OFFER
>
> **49.09** Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
>
> (a) make a motion to a judge for judgment or an order in the terms of the accepted offer, and the judge may grant judgment or make an order accordingly; or
>
> (b) continue the motion or proceeding as if there had been no accepted offer to settle.

[3] Brian Normand (the "plaintiff") opposes the motion, arguing there was no binding settlement agreement.

BACKGROUND

[4] The plaintiff's statement of claim, dated November 25, 2021, pleads that he suffered abuse over a number of years while living at a residential school operated by the defendant between 1964 and 1967. The plaintiff seeks damages for the alleged abuse caused by the defendant. The defendant's statement of defence, filed on June 21, 2022, pleads that it only operated a day school for boys, not a residential school, and that the plaintiff attended it for only one year from 1963 to 1964. The defendant disputes the plaintiff's claim, denying liability and damages. Without delving into the merits of the case it is apparent that there are significant factual and credibility issues in dispute.

[5] As of August 29, 2023 all of the evidence in the case had been gathered, including the plaintiff's examination for discovery evidence and the *de bene esse* evidence of the

Sisters who were not expected to be alive at trial. Soon thereafter, the parties' counsel communicated by email in preparation for setting the matter down for trial. One of the outstanding issues was whether the plaintiff would proceed separately with a claim against other potential defendants, specifically the Franciscan Priests (the "Franciscans") or bring them into the claim against the Sisters.

[6] The defendant's position is that on October 10, 2023 the parties reached a settlement agreement, through counsel, to discontinue the action without costs. The plaintiff's position is that a settlement agreement was not reached and therefore cannot be enforced. The plaintiff has since discharged his prior lawyer and has retained new counsel who is representing him on this motion. Regardless of the outcome of this motion, the parties agree that the plaintiff is not prejudiced in his right to pursue a claim against the Franciscans as they were not represented by the defendant's counsel and were not included in any settlement discussions.

ISSUES

[7] The issues on this motion are:

1. Whether there was a binding settlement agreement between the parties and if so;
2. Whether it ought to be enforced.

[8] Resolution of the issues requires determination of whether the provision of an executed release was an implied or explicit term of a binding settlement agreement, or a condition introduced by the plaintiff in a counter-offer.

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EVIDENCE ADDUCED ON THE MOTION

[9] The defendant filed an affidavit, sworn December 8, 2023, from a partner at their lawyer's office attaching the following exhibits: the statement of claim, the statement of defence and the email communications between counsel for the parties that comprise the pre-trial and settlement discussions.

[10] The plaintiff did not file any affidavit or other evidence on the motion.

Email Communications Between Counsel

[11] The material contents of the e-mails are as follows:

October 2, 2023 – Defendant's counsel to Plaintiff's counsel

> Dear Israel,
>
> The time for discontinuance of this matter on a without costs basis has now past.
>
> Can we schedule a call this week on getting this matter listed.
>
> The issues as I see it are as follows…
>
> 1. Will this action be separated from any action intended to be brought against the Franciscans?
> 2. Ms. LeBleu has had her evidence taken. We have the videos of the others so the trial could move quite efficiently.
> 3. Your fellow has a few UT – I am about to order the transcripts.
>
> Mark

October 2, 2023 – Plaintiff's counsel to Defendant's counsel

> Hello Marc,
>
> I have now received instructions from Mr. Normand. He is adamant that your client abused him leaving him with life long emotional scars. He is insistent that this matter proceed to trial.
>
> I need to look into separating this action from the one against the Franciscans. I will advise you once we determine that is doable.
>
> Regards,
>
> Israel

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October 2, 2023 – Defendant's Counsel to Plaintiff's Counsel

> Hi Israel,
>
> I gathered he was adamant. I was hoping that the quality of his evidence would have dissuaded him. Has he yet seen the evidence from Ms. LeBleu?
>
> I usually do not talk about the strength of cases, but I for the life of me do not see how he will withstand cross examination and the evidence of Mrs. LeBleu which went in with substantially no contradiction.
>
> Get back to me on the severance of the issues and we can move forward.
>
> Regards,
>
> Mark

October 10, 2023 – Plaintiff's Counsel to Defendant's Counsel

> Hello Marc,
>
> Mr. Normand has instructed me to discontinue the claim against your clients. I will send you the Notice of Discontinuance without costs for your consent in due course.
>
> Regards,
>
> Israel

October 10, 2023 – Defendant's Counsel to Plaintiff's Counsel

> Hi Israel,
>
> I have heard from my clients that they will accept a discontinuance of the action with prejudice but without costs along with the provision of an executed release in the format attached hereto.
>
> Could you please have your client execute this document and provide me with scanned copies of the release and discontinuance with prejudice, while providing me with originals in the post.
>
> You have my authority to execute the discontinuance on a with prejudice basis on these terms. Please provide your client with $1 and I will repay you the next time I see you.
>
> Mark

[12] Thereafter, on October 23, 2023, counsel for the defendant emailed counsel for the plaintiff to follow up on the matter. Counsel for the plaintiff responded on the same date, saying his client had been ill and unable to attend his office to sign the release. He further stated that he would advise as soon as he attended to execute the documents.

The defendant's counsel indicated that was fine and asked if an order could be taken out in the interim.

[13] On November 6, 2023, the following email was sent by counsel for the plaintiff to counsel for the defendant:

> Hello Mark,
>
> I regret to inform you that Mr. Normand has abruptly changed his mind and is refusing to sign the release or to discontinue his claim. He has fired me as his counsel and is seeking a new lawyer. If I haven't received a Notice of Change of Counsel soon I will bring a motion to remove myself from the record.
>
> Regards,
>
> Israel

[14] The following email sent the same day from the defendant's counsel went unanswered:

> Hi Israel
>
> That is unfortunate. I must ask, did he give you instructions at first to end the lawsuit on a without costs basis when you wrote to me first about this?
>
> Mark

THE GOVERNING LAW

Applicability of Rule 49.09

[15] I note at the outset that this motion was properly filed pursuant to Rule 49.09 of the Rules, as opposed to a motion for summary judgment pursuant to Rule 20, because the alleged offer and acceptance were in writing (***Cement Accents Manitoba Inc. et al. v. Wagner Construction et al.***, 2023 MBCA 59, at paras. 18 and 25).

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[16] In ***Pearson v. Plester et al.***, 1989 CanLII 5189 (MB CA), at para. 9, 62 Man. R. (2d) 142 (C.A.), the Manitoba Court of Appeal made the following comments respecting Rule 49.09:

> [9] [King's] Bench Rule 49.09 recognizes the right of a party to a settled action to elect, where the other party reneges on the settlement, to enforce the settlement or to accept the other party's repudiation of it. What the rule adds is a convenient procedure for enforcement in lieu of a separate action. The party wishing to enforce the settlement need only apply by motion for judgment in the terms of the settlement agreed upon. If the judge is satisfied that a settlement was reached, the judge cannot refuse to enter judgment on the ground that an order enforcing the settlement would cause injustice to a party. Nor can the judge refuse to do so on the ground that one of the solicitors lacked actual authority, unless the limitation on the apparent authority of that solicitor was known to the other party.

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[17] In determining whether to enforce a settlement agreement, the following principles apply:

1. An agreement to settle a claim is a contract;
2. To establish the existence of a contract, the parties' expression of agreement must demonstrate a mutual intention to create a legally binding relationship and contain agreement on all of its essential terms;
3. Where the parties agree on all the essential provisions to be incorporated in a formal document with the intention that their agreement shall be binding they will have fulfilled the requisites for the formation of a contract. The fact that a formal written document needs to be prepared and executed does not alter the binding validity of the original contract;

4. Where the essential provisions intended to govern a contractual relationship have not been settled or agreed upon, the original or preliminary agreement does not constitute an enforceable contract;
5. In considering whether certain terms of the settlement were implied, the court will look at the settlement discussions and the documentation and correspondence in the context of normal business practice and common sense; and
6. No party is bound to execute a document to effect the settlement agreement which contains terms or conditions which have not been agreed upon and are not reasonably implied in the circumstances.

(***Aleph-Bet Child Life Enrichment Program Inc. v. Kalo***, 2006 MBQB 107, at para. 9, citing ***Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.***, [1995] O.J. No. 721, 1995 CarswellOnt 4182 (Gen. Div.), at para. 17, affd [1995] O.J. No. 3773, 1995 CarswellOnt 4172 (Ont. C.A.); ***Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al.***, 2015 MBQB 116, at para. 36; ***Tapper et al. v. Tapper et al.***, 2012 MBCA 36, at para. 4.)

Formation of a Contract

[18] The court must look objectively at the words and actions of the parties to determine whether a contract was formed, not on the subjective intent of either party. The question is have the parties indicated to the objective reasonable bystander their intention to contract and the terms of such contract? (***Man-Shield***, at paras. 37-38; ***Olivieri v. Sherman***, 2007 ONCA 491, at para. 44.) In answering that question, the

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court is to consider all of the circumstances and take into account all material facts, such as written or oral communications, including the conduct of the parties.

[19] It is concisely stated that a contract will be found to exist where there is "*an intention to contract; settlement of essential terms; and sufficiently certain terms*" (***Cement Accents***, at para. 33). Dissatisfaction with the terms of a settlement agreement or unhappiness with counsel will not affect a settlement agreement that is found to exist. Furthermore, the court is not to delve into the merits or fairness of the settlement nor is it to permit an inquiry into the conduct of counsel unless it is limited to demonstrating that counsel, to "*the knowledge of the opposing counsel*", acted without binding authority. It bears repeating that even unfair or unwise agreements will be enforced provided that they are made between counsel with apparent authority to bind. (See ***Sherbreth v. Sherbreth***, 2022 MBKB 213, at para. 16, citing ***Sparco Holdings Inc. et al. v. Willdamerle Holdings Ltd. et al.***, 2010 MBQB 203, at paras. 25-26.)

[20] A settlement agreement may be reached quickly, without formality, and sometimes unexpectedly. Even within this context, release provisions can easily be implied. Disagreements over the interpretation of the settlement agreement or its non-essential terms does not void the initial agreement. There are practical ramifications for the parties involved. Therefore, if a party does not want to be bound until it has agreed to all terms that it subjectively considers essential to the deal, it must make that wish objectively clear. (See ***Apotex Inc. v. Allergan, Inc.***, 2016 FCA 155, at paras. 52-53 and ***Betser-Zilevitch v. Nexen Inc.***, 2019 FCA 230, at para. 3.)

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[21] With respect to the provision of a release, courts have consistently endorsed the following principle set out in ***Cellular Rental Systems Inc.***, at para. 24:

> [24] It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, no party is bound to execute a complex or unusual form of release: although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice.

(See also ***Hodaie v. RBC Dominion Securities***, 2012 ONCA 796, at para. 3; ***Ward v. Ward***, 2011 ONCA 178, at para. 54.)

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ANALYSIS AND DECISION

[22] It is important to recognize the context of this motion. Courts value and encourage settlement between the parties (***Olivieri***, at para. 50). In fact, the very purpose of Rule 49 of the Rules is to encourage and enforce settlements (***Cement Accents***, at para. 15).

Was there a Binding Settlement Agreement Between the Parties?

[23] In the present case, the plaintiff acknowledges there was an intention to contract when the offer to settle was made by him through counsel. Both parties agree that the essential terms of the settlement proposed by the defendant included that the plaintiff would discontinue the claim against the Sisters and that the discontinuance would be on a without costs basis. The heart of the issue in this case is whether the provision of a release was a settled term of the contract, or a condition in a counter-offer made by the defendant that was never accepted by the plaintiff.

[24] The defendant argues that in accordance with established principles, the settlement agreement of a discontinuance without costs implied a promise to furnish a release reflecting the terms of the agreement. Furthermore, the defendant argues that there was nothing about the release they furnished which made it complex or unusual. According to the defendant, the essential terms were settled and the plaintiff's disagreement or refusal to sign the release following the agreement does not repudiate the settlement agreement (***Reid v. Bracebridge***, 2021 ONSC 791, at paras. 38-39).

[25] The plaintiff argues that the settlement agreement being finalized was contingent upon the execution of the release, making it an essential term of the settlement agreement. The plaintiff argues that the words used by the defendant's counsel such as, "*will*" and "*along with the provision of an executed release*", indicates a counter-offer, not an acceptance of an offer. The plaintiff further argues that his refusal to sign the release amounted to a rejection of the counter-offer on November 6, 2023. As a result, he argues, the parties ultimately did not reach an agreement on the essential terms of a settlement agreement, therefore there is no binding agreement to be enforced.

[26] In support of his argument, the plaintiff relies upon ***Bouzanis v. Greenwood et al.***, 2022 ONSC 5262. In that case, the plaintiff's counsel made an offer of a dismissal without costs against the defendant. The defendant's counsel responded, "*I do now have instructions to consent to a dismissal without costs of the action against Mr. Greenwood, provided that Ms. Bouzanis executes a full and final release in LawPRO's form, a copy of which I will send to you shortly*" (at para. 2). The release was sent minutes later. It included the terms of the settlement but added a confidentiality clause that had never

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been agreed upon. The emails went unanswered by the defendant's counsel, who went on maternity leave a couple of weeks later. Subsequently, new counsel for the defendant wrote to the plaintiff's counsel stating, "*[M]y client is not willing to sign the release provided*" (at para. 2) and set out the position that the requirement of a release amounted to refusal of the original offer and constituted a counter-offer, which the defendant did not accept.

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[27] I find ***Bouzanis*** to be distinguishable from the present case. There, the language "*provided that*" clearly indicated the provision of a release as a condition-precedent to an agreement being reached. Furthermore, the court held that confidentiality clauses are "*unusual terms*" which go beyond a standard release. The defendant's insistence on a release that contained a confidentiality clause that had not been negotiated or agreed to by the parties made it clear that it was a counter-offer and not acceptance of the offer (***Bouzanis***, at para. 19).

[28] In the present case, use of the word "*will*", in context, meant an affirmative acceptance of the offer, as in "my clients will accept the offer". I also find that the words "*along with*", when read in context, was simply a reference to the manner in which one of the essential terms implicitly agreed upon would be facilitated – not the introduction of a new term or condition (***Calvan Consolidated Oil & Gas Co. v. Manning***, 1959 CanLII 56 (SCC), [1959] S.C.R. 253, p. 260).

[29] I have considered the background and circumstances leading up to the email communications between counsel as context. While coming to no conclusions about the strengths or weakness of either party's case, it is apparent from the communications

between counsel that there are significant factual issues, including credibility, that would be in issue at trial. I note that the plaintiff's offer to settle was not made at the outset of the litigation but made after gathering the evidence through the pre-trial process and prior to setting trial dates. Furthermore, the plaintiff previously discontinued against other defendants in the matter and was contemplating bringing an action against another potential defendant. I would expect that each party was contemplating the likelihood of their success at trial and the cost consequences if unsuccessful. Within that context, the plaintiff made the offer to settle by way of a discontinuance without costs. In exchange for discontinuing his claim, the plaintiff gained the certainty of not having to incur the defendant's costs. Without engaging in an assessment of the fairness or otherwise of the agreement, I cannot help but state the obvious: each side gave up something and gained something in its respective interests. Surely counsel advising and receiving instructions from their respective clients had all of these things in mind.

[30] I have reviewed the correspondence that is the subject of this motion. I find that the parties intended to contract, settled on the essential terms, and that those terms were sufficiently clear. There would be no purpose in accepting a discontinuance without a release. It is trite that a standard release is an implied term of a discontinuance settlement agreement. Without one, the defendant had no assurance that the plaintiff would not simply file another claim against them, after they agreed to waive costs.

[31] The subsequent communication by the plaintiff's counsel merely referred to his client being ill and being unable to come to the office to sign the documentation. Nowhere in the communication did the plaintiff's counsel suggest that the provision of a release

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amounted to a counter-offer, had not been agreed upon, or was in dispute at all. This is indicative that counsel for each party understood the provision of a release to be an implied and essential term of the settlement agreement. Furthermore, at no point did the plaintiff's counsel indicate that he had no authority to agree to the provision of a release as a condition of settlement. An objective bystander would have considered that the parties intended to bind themselves to a settlement agreement where the plaintiff would discontinue the action without costs, and which included the provision of a release. Alternatively, even if the release amounted to an essential term contained in a counter-offer by the defendant, I am satisfied that it was accepted by the words and actions of the plaintiff's counsel in any event (***Hallewick v. Everingham***, 2004 CarswellOnt 5365 (Ont. C.A.), at para. 8).

[32] When the plaintiff's counsel indicated that his client "*abruptly changed his mind*" and was refusing to sign the release or to discontinue his claim, there was no mention of concerns regarding the signing of a release (emphasis added). The communication was clear: the plaintiff changed his mind about the settlement agreement. I have no other evidence before me to indicate that he failed to understand his lawyer's advice, that he was mistaken, or that something other than a change of mind was what precipitated the position he took.

[33] In Manitoba there is authority that supports the policy reasons for upholding agreements to discontinue actions that include a release. In ***Manko v. Ivonchuk***, 1991 CanLII 11983 (MB KB), 71 Man. R. (2d) 67 (Q.B.), Dureault J. held at para. 14: "*In this province, a great many actions are settled by final release and notice of*

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discontinuance where the action has not gone to trial. This manner of out of court settlement is widely accepted as an effective instrument and rightly so". The court went on to note the heavy burden on the party seeking to set aside such an agreement, which further supports the application of an implied obligation to furnish a release in the context of this settlement agreement (at para. 21).

[34] In the circumstances of this case, the objective intention of the parties was to end the litigation prior to trial and based upon the stage at which the agreement was reached, I am satisfied it was intended to bring finality. There was no suggestion by counsel for the plaintiff that he intended to preserve his client's rights to institute a fresh action against the defendant if other facts, currently unknown, should implicate them. The only express reference to the preservation of a right of claim was in relation to the other potential defendants, the Franciscans, and the discontinuance and release clearly did not prevent the plaintiff from pursuing that potential claim.

Should the Settlement Agreement be Enforced?

[35] Having found a binding settlement agreement was reached between the plaintiff and the defendant, the remaining issue is whether it ought to be enforced. The principle of finality is important. Settlements entered into with the assistance of counsel should be upheld except in the clearest of cases and exceptional cases. (See ***Donaghy v. Scotia Capital Inc./Scotia Capitaux Inc.***, 2009 ONCA 40, leave to appeal refused, 2009 CanLII 27234 (SCC).)

[36] In the present case I have no evidence of compelling circumstances that could justify exercising discretion, such as mistake, fraud, bad faith, or miscommunication

with respect to the instructions to settle (***Milios v. Zagas***, 1998 CanLII 7119 (ON CA), 38 O.R. (3d) 218 (C.A.), at para. 20; ***Srebot v. Srebot Farms Ltd.***, 2013 ONCA 84, at para. 4). The email communication from the defendant's counsel to the plaintiff's counsel stated clearly that he had been instructed by his client to settle. Any issues arising between lawyers and their clients need to be addressed through the pursuit of other remedies. There is no evidence before me to contradict the stated reason for the plaintiff resiling from the agreement other than that he "*abruptly changed his mind*". While I am sympathetic to the plaintiff's change of mind, that is not a valid reason to set aside a settlement agreement that is found to have existed (***Roman Catholic Archiepiscopal Corporation of Winnipeg et al. v. Rosteski et al.***, 1958 CanLII 294 (MB CA), at p. 230).

[37] Upon consideration of the foregoing and all relevant factors, including the stage of the litigation, the fact that no order giving effect to settlement has been taken out, and the potential prejudice that each party may suffer, I have determined that the binding settlement agreement of a discontinuance without costs, including the provision of a release, ought to be enforced.

CONCLUSION

[38] I am granting the defendant's motion to enforce the settlement agreement pursuant to Rule 49.09.

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Costs

[39] The general rule is that costs are awarded to the successful party, which in this case is the defendant. If the parties cannot agree on the costs of this motion, they can make brief written submissions within 30 days.

_______________________________ J.

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