

Date: 2024 08 01
Docket: S-1-CV-2014 000 100

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

REDCLIFF DEVELOPMENTS LTD.

Plaintiff

-and-

MASKWA ENGINEERING LTD.

Defendant

Corrected: A corrigendum was issued on August 2, 2024; the correction has been made to the text and the corrigendum is appended to this Memorandum of Judgment.

MEMORANDUM OF JUDGMENT

OVERVIEW

[1] This is an application by Maskwa Engineering Ltd. (“Maskwa”) to dismiss the claim of Redcliff Developments Ltd. (“Redcliff”) against Maskwa by reason of delay. Maskwa relies on r 327(1)(b) of the *Rules of the Supreme Court of the Northwest Territories*, R-010-96; namely, that no step has been taken to materially advance the litigation for a period of five or more years. This rule is sometimes referred to as the “drop dead” rule. If I find that no step has been taken for five or more years, I must grant the application.

[2] The parties agree that the central issue before the Court is whether the steps which have been taken to set the matter down for mediation in the fall of 2024 constitute a step which materially advances the litigation. For the reasons that follow, on the facts of this case, I find that setting the matter down for mediation does materially advance this litigation and, accordingly, I dismiss the application by Maskwa.

FACTS

[3] The facts of this matter are straightforward and not contentious. This matter arises out of a dispute involving the construction of a three-story residential development in Yellowknife, Northwest Territories. Redcliff retained Maskwa to provide services relating to this development between 2011 and 2012. On June 24, 2014, Redcliff filed a Statement of Claim in relation to the services provided by Maskwa. A Statement of Defence was filed on February 25, 2015, documents were exchanged in 2015 and examinations for discovery took place in the spring of 2016. Redcliff provided answers to its undertakings on February 27, 2018 and Maskwa provided partial answers to undertakings on September 17, 2018 and provided the remaining answers to undertakings on February 13, 2019.

[4] Between 2020 and 2021, there was discussion between counsel about entering into a tolling agreement (being an agreement to suspend time frames) or a consent order establishing timelines for future steps. No tolling agreement was ever entered into nor did the parties agree on a litigation plan.

[5] As well, on March 11, 2020, the COVID-19 pandemic was declared by the World Health Organization which resulted in public health orders being issued in the Northwest Territories that, among other things, restricted travel in and out of the Northwest Territories. The affidavit of Mitchel Heron, on behalf of Maskwa, sworn April 17, 2024, reveals discussion between counsel on May 8, July 27, and November 2020 as to the challenges of travel restrictions in terms of Redcliff finalizing an expert's report.

[6] There is no doubt that while the courts in the Northwest Territories continued to carry on business as much as possible during the COVID-19 pandemic, travel restrictions in place in the Northwest Territories for a significant period of time complicated the conduct of civil litigation files.

[7] On January 20, 2023, counsel for Redcliff proposed that the parties consider mediating the matter. The parties then engaged in a discussion around the choice of a mediator, selecting three possible mediators by February 2023. There were challenges with the availability of two of the mediators but by February 2024, Redcliff's counsel had determined that the third mediator was available in June 2024 for a mediation. The parties were unable to confirm those dates as Maskwa's counsel did not respond to the email inquiry as to availability within the relatively short time frame needed to confirm the June date. Consequently, the June date was released but alternate dates in September 2024 were offered. On February 14, 2024, the

parties agreed to the September dates and on April 8, 2024, the mediator confirmed with counsel for Redcliff and Maskwa a mediation date of September 30, 2024.

[8] On May 9, 2024, the mediator advised that the September mediation date fell on a statutory holiday in British Columbia. The mediation was subsequently rescheduled to October 25, 2024.

[9] Maskwa's notice of motion seeking to dismiss Redcliff's claim was filed on May 1, 2024.

LEGAL ANALYSIS

[10] Rule 327 states as follows:

327(1) A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court

(a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or

(b) shall dismiss so much of the action or proceeding as relates to the application, where for five or more years no step has been taken that materially advances the action or proceeding.

[11] As stated above, Maskwa relies on r 327(1)(b) to argue that this court must dismiss the proceeding based on their assertion that no step has been taken that materially advances the proceeding. They argue that the last step taken which materially advanced the proceeding was Maskwa's answers to undertakings given on February 13, 2019. They disagree with Redcliff's argument that the agreement to set the matter down for mediation and the actual setting of a mediation date constitutes a material step.

[12] An assessment of what materially advances a proceeding is, by necessity, highly fact specific and contextual. A functional, rather than formalistic, approach is appropriate to determine if a step constitutes a significant advance: *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at paras 18-20, which considered Alberta's equivalent r 4.33.

[13] Maskwa relies on *Muckpaloo v MacKay*, 2002 NWTSC 12, in which Vertes, J held that settlement negotiations do not constitute a step which materially advances

an action. Vertes, J held that materially advancing an action are those steps which move the action towards trial: *Muckpaloo*, para 19 and 20. Notably, in *Muckpaloo*, the litigation spanned 12 years, with significant gaps in addition to a five year gap between 1996 and 2001 and little evidence as to the nature of the ongoing discussions between counsel. Indeed, in *Muckpaloo*, the evidence was that counsel for the plaintiff had closed her file in 1998, three years prior to the application to dismiss being filed, and that the plaintiff and her counsel appeared content to rely on the interim order rather than pursuing a further order.

[14] Redcliff submits that there has been a cultural shift in litigation such that the focus of a delay inquiry should not simply be on whether a step moves an action towards trial but whether a step moves the lawsuit forward in a meaningful way. As such, they submit that the test is not that articulated by Vertes, J in *Muckpaloo*, with its focus on movement towards trial, but that this Court must take a more holistic view of the facts to determine whether the actions taken materially advance the potential resolution of the matter. They specifically reference the comments of the Alberta Court of Appeal in *Weaver v Cherniawsky*, 2016 ABCA 152 at paras 17-18:

[17] Application of the new Rules requires a functional approach. Their purpose and intent, as emphasized in the foundational rule 1.2, is to provide fair and just resolution of claims in a timely and cost effective manner. The foundational rules parallel a cultural shift in litigation that deemphasises trial as the dominant mechanism for resolving civil disputes in favor of summary procedures and ADR: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 and *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, 572 AR 317 at para 15; *Heurto v Canniff*, 2014 ABQB 534 at paras 13-15, aff'd 2015 ABCA 316.

[18] Under the delay Rules the functional approach requires the chambers judge to determine whether the step said to be a “significant advance in an action” actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and the timing of the step are also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than on its form: *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para 19, 585 AR 81; *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123 (available on CanLII); *Ursa Ventures Ltd. v Edmonton (City)*, 2016 ABCA 135, paras 18 and 19 (available on CanLII).

[15] *Weaver* also involved an offer to attempt to settle the matter through judicial dispute resolution (“JDR”) which was never scheduled, leading to the litigation languishing for several years. In *Weaver*, the Alberta Court of Appeal held, on the facts of that case, that an agreement to set the matter for JDR, without anything further, was not a step that materially advanced the action. The court stated:

[20] This was merely a failed attempt to schedule a JDR and nothing more. Considering the lawsuit's nature, value, importance and quality, the failed attempt did not move the lawsuit forward in a meaningful way. The mere agreement to schedule a JDR with no follow up within a reasonable time when the proposed dates were not available does not significantly advance an action. The appellant's contention that a formal request for JDR was sufficient to significantly advance the action relies on form not substance, and does not pass scrutiny on a functional approach.

[21] Given this conclusion it is unnecessary to address and resolve the second ground of appeal, that is, whether an agreement to participate in ADR significantly advances an action. An unconditional agreement to participate in ADR may advance an action. However, the functional analysis requires an inquiry into substance. On the facts of this appeal, even if such an agreement was reached, it was entirely ineffectual because it did not move the action closer to resolution. That said, each piece of litigation is unique and the content, value, and timing of the advance in the action said to "reset the clock" for the purposes of rule 4.33 must be assessed within the context of that lawsuit. This is the heart of the functional approach: *Ursa* at para 21.

[16] Maskwa also relies on *Thiessen v Corbiell*, 2019 ABCA 56 for the proposition that an agreement to mediate does not constitute a step which materially advances an action. In *Thiessen*, the parties attempted in 2015 to obtain a court order consolidating two matters. This order was rejected. Two years later, the parties agreed on mediation in January 2017, but one of the parties cancelled the mediation 8 days prior to the mediation in June 2017 for personal reasons but expressed a desire to reschedule it "in the upcoming months". Two months later, before a mediation date was set, an application for dismissal based on long delay was filed. The Alberta Court of Appeal held that neither the failed attempt to consolidate matters, nor the willingness to engage in mediation, materially advanced the matter. With reference to the willingness to mediate, the Court held that an agreement to set the matters down for a mediation hearing was simply an agreement to enter settlement discussions and did not narrow the issues or move the parties to resolution.

[17] In both *Weaver* and *Thiessen*, attempts to mediate appear to have been desultory at best. In *Weaver*, several years passed after attempts to schedule a JDR were unsuccessful. In *Thiessen*, the mediation had been booked for six months and was cancelled a mere 8 days prior to it occurring without a specific commitment to a new date.

[18] In contrast, on the facts of this case, the evidence establishes a sustained commitment on the part of Redcliff to arrange mediation as of January 2023. Prior to that date, the delay in pursuing the action for the period 2020 to 2022 can be partially explained by the impact of the COVID-19 pandemic and the travel restrictions in place for a considerable period. While the courts in the Northwest

Territories remained open, travel restrictions and other challenges posed by the pandemic did have the potential of complicating the conduct of civil litigation files.

[19] After mediation was agreed to and the parties agreed on acceptable mediators, there is evidence of the challenges of retaining a mediator as one was winding down his practice and another was not available until early 2025. A third mediator had availability in June 2024, but, as noted above, counsel for Maskwa was not able to confirm their availability within the relatively short time frame afforded to them, leading to the mediation being scheduled for the fall of 2024.

[20] Unlike *Muckpaloo*, this is not a situation where the matter was left to indefinitely languish. Unlike both *Weaver* and *Thiessen*, once mediation was agreed to, efforts to retain a mediator were genuine as were attempts to finalize the date for mediation. While it is not determinative, it is also noteworthy that the mediation date was set on April 14, 2024, prior to the application for dismissal being filed. This is not a situation where mediation is proposed as a last-ditch effort to avoid a dismissal application.

[21] This is also a matter where counsel appeared to be alive to the benefits of mediation versus going to trial. There is reference in the email exchange between counsel to the file not being a “massive matter” (the claim is under \$500,000) and the value of saving travel costs by holding the mediation virtually.

[22] Additionally, at the time mediation was proposed, the evidence is clear that the alternative was entering into a procedural order with a view to getting the matter to trial. The “culture shift” in civil litigation required by *Hryniak v Mauldin*, 2014 SCC 7 suggests that courts should give real, meaningful weight to genuine attempts by counsel to mediate disputes rather than avail themselves of the court process.

[23] I also note that there is no general rule that mediations cannot constitute a step that advances an action. The inquiry is fact-specific and contextual. In the context of specific circumstances, mediations have been held to constitute a step that materially advanced an action: *369413 Alberta Ltd v Pocklington*, 1998 ABQB 603 at para 97.

[24] In summary, the genuineness of the attempts to set the matter down for mediation, the value of the claim itself, the appropriateness of mediation as a dispute resolution mechanism, and the timing of the upcoming mediation, all persuade me that, on the facts of this case, the setting down of this matter for mediation in October 2024 is a step which materially advances this litigation.

[25] There was also argument as to whether r 330, allowing counsel to enter into an agreement to vary the application of the time constraints in r 327, might be engaged on the facts of this case. Maskwa argued that r 330 was not engaged, as there was no express agreement to vary the time constraints of r 327. Given the conclusion I have reached that on the specific facts of this case, the agreement to mediate was a step that materially advanced this litigation, I do not have to decide that issue.

[26] Redcliff's counsel proposed that I impose terms with respect to the future conduct of this litigation if the mediation currently scheduled for October 2024 is not successful in resolving matters. I decline to do so at this time. Both counsel are aware of the value of moving this matter forward, whether it be through mediation or the court process. If mediation is unsuccessful, and there are difficulties taking the next steps in the court process, either counsel may apply for the appointment of a case management judge pursuant to rule 283 or avail themselves of the other procedures available in the *Rules of the Supreme Court of the Northwest Territories* to move matters forward.

[27] As Redcliff was successful in defending this application, Redcliff is entitled to party and party costs of this application. I thank both counsel for their excellent and focused submissions.

"S.M. MacPherson"
S.M. MacPherson
JSC

Dated in Yellowknife, NT this
1st day of August, 2024

Counsel for the Plaintiff:

Jon Rossall, KC
Erik Holmstrom

Counsel for the Defendant:

Kent T. West

**Corrigendum of the Memorandum of Judgment
Of
The Honourable Justice S.M. MacPherson**

1. An error occurred on Page 7 at Counsel for the Plaintiff:

Counsel for the Plaintiff: reads Eric Holmstrom:

Counsel for the Plaintiff: has been corrected to read:

Erik Holmstrom

2. The citation has been amended to read:

Redcliff Developments Ltd v Maskwa Engineering Ltd, 2024 NWTSC 40 **.cor 1**

(The changes to the text of the document are highlighted and underlined)

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