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Docket: CI 06-01-48945
(Winnipeg Centre)
Indexed as: Grumm v. Warkentin
Cited as: 2020 MBQB 164

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MELANIE DAWN GRUMM,	)	Counsel:
	)	
plaintiff,	)	ISRAEL A. LUDWIG
	)	for the plaintiff
- and -	)	
	)	CORY A.M. TOKAR
KENNETH PETER WARKENTIN,	)	for the defendant
	)	
defendant.	)	JUDGMENT DELIVERED:
	)	NOVEMBER 12, 2020

CHARTIER J.

[1] The defendant moves to dismiss the plaintiff's action for delay, pursuant to Court of Queen's Bench rule 24.01. At the hearing of the motion, it became apparent that the transcript of the cross-examination on the affidavit of the defendant had not been adduced into evidence and the plaintiff sought an adjournment in order to file that evidence. I denied the request for an adjournment but allowed the filing of further evidence and written submissions relating to that further evidence, which evidence has since been filed and considered along with the rest of the evidence. I should add that I did not consider

the affidavit evidence of Ms. Grumm sworn December 19, 2019, as was agreed to by the parties. That affidavit had been filed subsequent to the cross-examinations on affidavit.

BACKGROUND FACTS

[2] On October 27, 2006, the plaintiff issued a statement of claim alleging that on September 15, 2006 the defendant assaulted her causing personal injuries. The plaintiff alleged that she sustained personal injuries as a result of the assault, including a broken nose. The defendant filed a statement of defence and counterclaim on October 16, 2007. The plaintiff filed a reply and statement of defence to the counterclaim on October 20, 2010.

[3] The parties filed pre-trial briefs on October 26, 2010 and December 1, 2010 and a pre-trial conference was held on December 2, 2010. Timelines were set for the parties to exchange affidavits of documents by December 20, 2010 and to conduct examinations by January 20, 2011 with answers to undertakings from the examinations for discovery to be completed by the next pre-trial conference, which was scheduled for March 17, 2011.

[4] At the pre-trial conference on March 17, 2011, the parties advised that they had exchanged affidavits of documents and had completed examinations for discovery. At this pre-trial conference timelines were set that the defendant was to provide undertakings to the plaintiff within 30 days of receiving the plaintiff's undertakings. A third pre-trial conference was scheduled for May 10, 2011, which

was subsequently adjourned to October 27, 2011. The parties advised that undertakings had not been completed and further timelines were set that the plaintiff would provide her undertakings to the defendant by December 1, 2011, the defendant would provide his undertakings by January 9, 2012, and the plaintiff would advise the defendant if she would be obtaining updated medical information by November 1, 2011. A fourth pre-trial conference was scheduled for January 18, 2012, but the parties sought an adjournment of that pre-trial conference because the plaintiff was awaiting additional medical information from her doctors. The pre-trial was adjourned and a note on the file indicates that counsel were to contact the trial coordinator to set a new date, but this was not done.

[5] The awaited medical evidence that was to be brought forth by the plaintiff did not materialize and was not provided to the defendant.

[6] This litigation effectively then remained dormant for a number of years. The defendant's previous counsel ceased practising law around July 2015 and the defendant retained the services of his new counsel in October 2017. A notice of change of lawyer was filed on January 2, 2018.

[7] The defendant filed a motion to dismiss the action for delay on February 2, 2018. Cross-examinations were held on May 24, 2018.

[8] The defendant submitted that under the new rule 24.01(2), "if the court finds that delay in an action is inordinate and inexcusable, that delay is presumed ... to have resulted in significant prejudice to the moving party". The defendant also says that the matter is not complex and there is no reason this matter could

not have proceeded expeditiously. The defendant notes the significant time that this lawsuit has taken. The defendant submits that to the extent the delay is attributable to the plaintiff's previous counsel is not a justifiable excuse for the delay. If this matter were to proceed to trial the defendant would be unable to properly challenge the plaintiff's evidence.

[9] The plaintiff in response submitted that since much of the delay took place prior to the coming into force of the new rules on delay, that the previous rule ought to apply on this motion instead of the new provisions of rule 24. The plaintiff also says the delay was occasioned by her previous counsel and that ought to be taken into account to explain the delay. Finally, the plaintiff says that despite the passage of time the defendant has not been prejudiced by the delay and notes that liability is not in issue.

ISSUES

[10] The issues are:

1. Should this motion proceed under Court of Queen's Bench rule 24.01, as amended on January 1, 2018, or should it proceed under the rule in existence prior to that date?

2. Should the plaintiff's action be dismissed for delay?

ANALYSIS

Should the motion proceed under new Queen's Bench rule 24.01 or the rule in existence previously?

[11] The plaintiff argued that the delay complained of by the defendant took place between the years 2011 and 2017, and as the rule changed on January 1,

2018 it would be applying the rule retroactively and there is a strong presumption against the retroactive application of new legislation. In this regard counsel cited ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue***, [1977] 1 S.C.R. 271, and other related cases.

[12] I find that the new provisions apply as the motion was filed after the coming into force of rule 24.01, and consequently the transitional provisions set out in rule 1.02(2) do not apply in this case. I would also point out that the rule for dismissal for long delay does not apply here as that rule applies to motions to dismiss an action that had been brought after January 1, 2019. The motion in this case was brought on January 1, 2018. There was no dispute on this point by the parties.

[13] I am not persuaded that the cases referred to by the defendant apply in the case of court rules. In my view, the line of cases following ***Gustavson Drilling*** do not apply to court rules, which are inherently procedural. I also note that rule 24.02(1), the rule for dismissal for long delay, while not applying here, has a specific transitional provision that allows for the coming into force of that rule one year after the January 1, 2018 date of its coming into effect. No such transitional provision applies to rule 24.01. For all these reasons, the applicable provision in this matter is the current version of rule 24.01.

[14] Rule 24.01 reads as follows:

> **Dismissal for delay**
> 24.01(1) The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.

> **Presumption of significant prejudice**
> 24.01(2) If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.
>
> **What constitutes inordinate and inexcusable delay**
> 24.01(3) For the purposes of this rule, a delay is inordinate and inexcusable if it 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.

[15] This new rule was considered by this court in ***D.L. et al. v. C.P. et al.***, 2019 MBQB 42 (CanLII). In that case, Martin J. stated that the revised rule changes the focus to spotlight delay, which is often more defined and demonstrable than prejudice. Martin J. also found that as the new rule refers to the nature of the issues and the particular circumstances of the case that some of the factors set out in the jurisprudence remain applicable under the new rule. He set out some of those factors, as follows, at paragraph 35:

- the subject matter of the litigation;
- the complexity of the issues between the parties;
- the length of delay;
- the explanation of the delay; and
- other special circumstances.

Those factors were developed under the case law pertaining to the old rule, including in the leading appellate decisions of ***Law Society of Manitoba v. Eadie***, 1988 CanLII 206 (MBCA), and ***Fegol v. National Post Co. et al.***, 2007 MBCA 27.

[16] I will now consider those factors in considering the circumstances in this case.

Subject matter of the litigation

[17] This is a personal injury matter and not an unduly complex one. The alleged injuries were sustained in 2006. I also find that if this matter were to proceed to trial, due to a lack of medical records and other relevant evidence the defendant would now be prejudiced in defending the action. The last pre-trial conference that was scheduled for January 2012 was adjourned in order for the plaintiff to obtain updated medical reports. Those reports were never obtained and the defendant is prejudiced by not having received those reports in a timely fashion and being able to test that evidence.

Complexity of the issues between the parties

[18] The issues are not complex. The assault is not in issue and is in fact conceded by the defendant, but the issue is the nature of the alleged injuries and whether the defendant caused the alleged injuries to the plaintiff as well as the quantum of damages of these injuries. That, in turn, is dependent to a large extent on the medical evidence. However, there is nothing particularly difficult about this matter that would account for any lengthy delay.

Length of the delay

[19] The allegations forming the basis of the claim arose on September 15, 2006. It took considerable time for pleadings to close and then there was activity on the file, including discoveries. In particular, although there were three pre-trial conferences, a further one was set for January 18, 2012, which was adjourned in

order for the plaintiff to obtain additional medical information. From the time the plaintiff wrote the letter on January 13, 2012 seeking an adjournment, nothing further occurred on the file until the defendant filed a notice of change of lawyer on January 2, 2018. After that took place, there was communication between counsel and the defendant filed the motion in this matter. In particular, there was no new medical information obtained by the plaintiff, the plaintiff had not sought psychiatric treatment and had not seen a doctor regarding her deviated septum since 2007. I note in passing that it also took the plaintiff 15 months to complete her undertakings for the motion for dismissal for delay. The delay in this case is very lengthy, particularly taking into account the lack of complexity of the matter. There was essentially no activity from January 2012 to when the motion for delay was brought in 2018.

Explanation of the delay

[20] I find that the plaintiff has provided no reasonable explanation for the delay. She alleged that she had psychological difficulties dealing with the lawsuit, and while that may be the case it is not a reasonable explanation for not proceeding with the lawsuit. I also note that the plaintiff has not provided any medical evidence concerning the ongoing nature and extent of her injuries aside from what was disclosed in the affidavit of documents in 2007 and a few additional documents.

[21] If any of the delays were caused by the plaintiff's former counsel that is not a justifiable excuse for the delay, as was held by the Manitoba Court of Appeal in ***Hughes v. Simpson-Sears Ltd.***, 1988 CanLII 1373 (MBCA).

Prejudice to the defendant

[22] I find that this motion should be granted on the basis of the inordinate and inexcusable delay which has resulted in significant prejudice to the defendant. I also agree with the defendant's submissions that there would be significant prejudice to the defendant in this case as his ability to defend this action is rendered extremely difficult because of the passage of time and the unspecified nature of the plaintiff's injuries, which would be based on the plaintiff's evidence, and given that 14 years have elapsed since the incident giving rise to the action, I am satisfied the passage of time will have a significant impact on the memories of the parties and their ability to testify as to the nature of the injuries therefore resulting in prejudice to the defendant. The plaintiff's dentist, who provided a letter dated January 24, 2011, has passed away and is therefore not available as a witness. Dr. Lang, who was the first doctor to prescribe prescription drugs to the plaintiff, has also passed away.

[23] I find that many of the same considerations that were mentioned by Simonsen J. (as she then was) in ***North v. Boschman***, 2009 MBQB 176, are applicable to this case, including the dated medical evidence, the difficulty for the defendant to properly defend himself on the issue of damages, and the inability to obtain an independent assessment on a timely basis or to otherwise challenge the

plaintiff's subjective complaints (see ***North***, paragraphs 35-37). ***North*** was cited with approval by the Court of Appeal in ***Dubois v. Manitoba Lotteries Corp.***, 2009 MBCA 108 (CanLII), as follows:

> 30 And more recently, in *North v. Boschman*, 2009 MBQB 176, Simonsen J. wrote (at paras. 26-27):
>
> . . .
>
> The jurisprudence has also stressed the need for personal injury accidents to be tried without undue delay; there is a particular concern in such cases not only about deterioration in the quality of the evidence of the parties but also the medical evidence (***Mauer***, para. 19). ...

[24] In all the circumstances, I am granting the defendant's motion to dismiss the plaintiff's action. The defendant had also filed a counterclaim but defendant's counsel indicated at the hearing that he would no longer be proceeding with that action. Accordingly, the counterclaim is also dismissed, without costs.

[25] The defendant is entitled to costs on their motion to dismiss the plaintiff's action, which if not agreed upon can be spoken to.

_____ J.