Citation: Agusti v Fortified Developments Inc, 2025 MBCA 62
Date: 20250620
Docket: AI24-30-10106

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N:

	)	***G. M. Driedger, K.C.*** *and*
	)	***L. M. Mulholland***
LUCRECIA AGUSTI	)	*for the Appellants*
	)	
(Plaintiff) Respondent	)	***A. Silver*** *and*
	)	***A. A. E. Sharpe***
- and -	)	*for the Respondent*
	)	
FORTIFIED DEVELOPMENTS INC. and FORTHRIGHT MANAGEMENT INC.	)	*Appeal heard and*
	)	*Decision pronounced:*
	)	***June 10, 2025***
(Defendants) Appellants	)	
	)	*Written reasons:*
	)	***June 20, 2025***

MONNIN JA (for the Court):

[1] The defendants, Fortified Developments Inc. and Forthright Management Inc., appealed from an order dismissing their motion to set aside default judgment obtained by the plaintiff. After hearing argument, we dismissed the appeal from the bench with brief reasons to follow. These are those reasons.

[2] A brief recitation of the facts is in order. The plaintiff is an eighty-two-year-old woman—eighty at the time of the incident leading to the

statement of claim—and was injured when she slipped and fell on November 14, 2022, at premises owned and managed by the defendants. She suffered extensive injuries and was hospitalized for a number of days.

[3] On June 15, 2023, she retained the services of a lawyer, John Michaels (Michaels), who, after repeated attempts to obtain a response from the defendants or their counsel, issued a statement of claim on October 4, 2023. The statement of claim was served upon the defendants personally and upon their law firm registered for corporate purposes. Grant Driedger (Driedger) of that firm called Michaels in response to receiving a copy of the statement of claim, but they were unable to speak at the time. Attempts were made to reach each other over the next few days. The last attempt ended with Michaels leaving a message for Driedger to return the call. No return call came, nor was there any correspondence sent to confirm representation or to seek an extension of time to file a statement of defence.

[4] On November 10, 2023, Michaels noted default without having heard from Driedger or attempting to reach him any further. After noting default, Michaels moved to obtain judgment by proving the plaintiff's damages, which occurred on March 13, 2024, when he obtained judgment in the amount of $113,126.50, which included $85,000 in general damages. He did not serve the defendants or their counsel, nor was he required to do so by the MB, *King's Bench Rules*, Man Reg 553/88 [*KB Rules*], after having noted them in default.

[5] In the meantime, defendants' counsel, who had become aware of the noting of default, moved before an associate judge to set it aside. By the time the matter proceeded before the associate judge, the Court had already

recorded the default judgment of March 13, 2024 and therefore a new notice of motion was filed to set aside default judgment. In support of that motion, the affidavit of a senior property manager for the defendants, as well as the affidavit of a legal assistant with the firm, were filed. In response, Michaels filed his own affidavit.

[6] No affidavit was filed by Driedger. When questioned as to why that was on the hearing of the appeal, the Court was advised that it was because counsel were aware that an affidavit from counsel who would be appearing before the Court was frowned upon. (The obvious answer to that dilemma would have been to have another firm handle the motion in order to allow the filing of an affidavit from Driedger, as was the case with respect to Michaels.)

[7] The motion pursuant to rule 19.08 of the *KB Rules* proceeded before a Court of King's Bench judge on June 4, 2024. After hearing submissions, the motion judge gave a brief and cryptic oral decision dismissing the motion. He noted that *MPIC v Landry*, 2005 MBQB 141, provides a list of non-exhaustive factors to help guide a motion judge in weighing whether the party bringing the motion has met its onus to establish the default ought to be set aside. He then listed the factors that he considered, namely:

> (1) he was unable to discern to a satisfactory level that the defendants had an ongoing intention to defend;
>
> (2) the defendants had failed to adequately explain why there was a delay in filing the statement of defence;
>
> (3) he was unable to satisfy himself whether the delay in filing the statement of defence was willful; and

(4) while the motion to set aside the noting of default was brought forward with dispatch, there was no reasonable explanation for why a statement of defence was not filed.

He, therefore, was not inclined to grant the relief sought.

[8] On appeal, the defendants' position is twofold. Firstly, they submit that the motion judge failed to apply the appropriate legal test, an error of law, to be reviewed on a standard of correctness. They argue that he failed to refer to the fact that they had a meritorious defence or to consider the prejudice or harm to the plaintiff as factors in his decision. As well, he alluded to irrelevant factors, such as whether service had been properly performed, which was not, nor should have been, an issue. Once an arguable defence had been raised, along with an indication of the plaintiff having had an intention to defend all along, there was authority to set aside the default judgment (see *GFK Capital Base Corp v Fernando*, [1994] 1 WWR 735 at para 26, 1993 CanLII 14748 (MBCA)).

[9] Secondly, they also argue that the motion judge misapplied the evidence to the law, as there was evidence of an ongoing intention to defend, as well as a reasonable explanation for the delay in filing a statement of defence.

[10] The defendants also pointed to the fact that shortly following the oral decision, on June 21, 2024, the Court of King's Bench issued a practice direction whereby the service of a motion for default judgment would in most circumstances be required, changing the current practice, which made it optional at the discretion of the presiding judge (see Court of King's Bench of Manitoba, "Practice Direction: Service of Motion for Default Judgment"

(21 June 2024), online (pdf): <manitobacourts.mb.ca/site/assets/files/2045/practice_direction_-_service_of_motion_for_default_judgment.pdf>). The plaintiff argues that allowing the order to stand would result in an injustice.

[11] We are all of the view that this case falls to be decided on the issue of the standard of review. What is being argued by the defendants, in essence, is that this Court should re-weigh the various factors that the motion judge considered and reach its own conclusion. This is, of course, contrary to the standard of review in *Elsom v Elsom*, [1989] 1 SCR 1367, 1989 CanLII 100 (SCC), whereby we are to give deference to a motion judge's exercise of judicial discretion unless there is a misdirection or a decision that is so clearly wrong as to amount to an injustice (see also *Perth Services Ltd v Quinton*, 2009 MBCA 81 at para 25).

[12] We are not persuaded that the motion judge misdirected himself in fact or law, or that this is a clear case where an exercise of discretion has resulted in an injustice. The glaring hole in the defendants' argument is that there is no direct or even indirect evidence as to a credible explanation for the delay in filing a statement of defence or seeking an extension of time to do so. They speak of a miscommunication between counsel and client and an assumption by defendants' counsel. There is no support for either in the affidavits filed.

[13] We agree that the evidence before the motion judge could have led him to a different conclusion; however, the one that he reached was available to him. It is not our role, absent an error or misdirection, to perform a re-weighing of the factors to reach a different conclusion.

[14] For these reasons, we dismissed the appeal with costs on the tariff.

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