

Court of King's Bench of Alberta

Citation: MCG Construction Ltd. v Shahni Holdings Ltd., 2025 ABKB 496

Date: 20250827
Docket: 1303 12012
Registry: Edmonton

Between:

MCG Construction Ltd.

Plaintiff (Respondent)

- and -

Shahni Holdings Ltd.

Defendant (Appellant)

**Endorsement
of the
Honourable Justice Michael J. Lema**

I. Introduction

[1] Did the applications judge err in ordering that MCG's application for summary judgment and Shahni Holdings' application for delay-based dismissal be heard at the same time?

[2] I find that he did, for the reasons outlined below.

II. Analysis

[3] First, if successful, the delay application would end MCG's action against Shahni, meaning no time and effort would be wasted by either side in preparing for MCG's application.

[4] This would square with the purpose of the *Alberta Rules of Court* (per Rule 1.2(1)) i.e. “to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way” and with one of their intended uses (per R. 1.2(2)(b)) i.e. “to facilitate the quickest means of resolving a claim in the last expense.”

[5] For cases supporting first-up scheduling of applications with the potentially determinative outcomes, see *Goodswimmer v Canada (AG)*, 2017 ABCA 365 (leave denied – 2018 CanLII 61050 (SCC)) (paras 17-19 and 22, in particular para 18):

In this action the case management judge noted that the various applications raised overlapping issues. For example, on many issues the application to strike was based on an argument that the original pleading and any potential amendment to it did not disclose a valid cause of action. **The case management judge decided that in this complex case it was more efficient to deal with the application to strike or summarily dismiss first, while having regard to the arguments in support of various amendments: reasons at paras. 18-21. Where the case management judge decided that a particular claim should be struck or summarily dismissed, further amendments to it would be pointless: reasons at paras. 581, 607. [para 18]**

[6] And *Takacs v International Union of Operating Engineers*, 2023 ABKB 248 (Mah J.) (revd on other ground 2025 ABCA 6):

Mr. McGown said the long delay application had to be decided first to see if there was any action that survived that could go to JDR. This is the logical order of decision-making to me. [KB decision, para 13]

[7] And *Aircraft Finance Services Inc v Miller*, 2018 ABQB 1005 (M. Robertson):

... in my view I must determine the question of whether the claim should be dismissed for delay and consequential prejudice under rule 4.31 before considering the amendment application. **It would seem appropriate to determine whether the claim should be dismissed because the movement has been dilatory before considering whether the plaintiff should be allowed to take up even more time, with new defendants, if the claim, perhaps, should already be dismissed.** [para 4] [emphasis added]

[8] On this aspect, I accept and adopt Shahni’s arguments to the same effect in paras 34, 35, and 37 of its appeal brief.

[9] Second, Shahni has arguable (i.e. non-frivolous) positions under both Rules 4.31 and 4.33, as detailed (in part) in paras 39-41 of its appeal brief.

[10] I recognize that MCG has its own arguments on delay and that they may carry the day. But I am not satisfied, at this stage, that that is the obvious or necessarily expected outcome. For instance, while MCG may have good reason to be concerned about the timing of the revelation of the death of Shahni’s principal, MCG has not offered (at least at this stage) any material counterarguments to Shahni’s assertions of prejudice to its litigation position caused by his death.

[11] Third, the dismissal-for-delay application can be heard relatively quickly since (as Shahni argues) it is largely anchored in the existing court record and lawyer-to-lawyer correspondence already catalogued (or largely catalogued) in filed affidavits.

[12] If any further affidavits are required and, if so, if any cross-examinations are needed, those can be scheduled and conducted (assuming counsel availability) over the next month or two. As well, I am seizing myself with the dismissal application and will find time in my schedule for argument this fall once any such further affidavits and cross-examinations are completed.

[13] For greater certainty, I am not seizing myself (at least at this stage) with the summary-judgment application i.e. if the dismissal application fails.

[14] Fourth, AJ Smart observed in his oral decision that “I think [there’s] going to be a lot of overlap in the evidence [on the dismissal-for-delay and summary-judgment applications].” But he did not point to any particular overlap, and I cannot see any, at least based on the existing materials. As noted above, the delay application will turn on the litigation steps that have occurred (or not occurred) to date, with the summary judgment (on the other hand) turning on evidence of the underlying events i.e. the pre-contractual negotiations, the construction contract, and its performance i.e. events fully or largely preceding the litigation steps.

[15] Concerning Shahni’s reliance on *Darby v Citifinancial*, 2022 ABQB 9, I am not relying on that decision in allowing Shahni’s appeal here, as I do not agree that the effect of filing a dismissal-for-delay application is to freeze all other litigation steps in the proceeding.

[16] Here is the discussion of that point in *Darby*:

In *Riviera Development Inc v Midd Financial Corp*, 2002 ABQB 853 at para 39 [*Riviera*], Moen, J. dealt with an application for long delay filed under Rule 244.1, the predecessor to Rule 4.33 and concluded:

Once an application has been filed for dismissal of an action under Rule 244.1, the Plaintiff cannot take any steps until that motion has been heard. This is logical, because it would be very easy for a Plaintiff to defeat such a motion simply by taking a step that materially advances the action before the motion to dismiss is heard.

The decision in *Riviera* was confirmed in *Ma v Kwan*, 2019 ABQB 89 at para 22 [*Kwan*] where Poelman, J. stated:

Presumptively, the filing of a dismissal or long delay application crystallizes the rights of the parties as the date of filing. The relevant period of delay is determined by looking back from the date the application was filed, not heard: *Flock v Flock Estate*, 2017 ABCA 67, 49 Alta L.R. (6th) 41 (Alta. C.A.), para 17(8) leave to appeal to the SCC refused 2017 CanLII 68352 (SCC), [2017 CarswellAlta 1991 (SCC)], 37552 (19 October 2017). **In the usual course, there should be no further steps in the action until the dismissal application has been decided:** *Riviera Developments Inc. v Midd Financial Corp.*, 2002 ABQB 853, 325 A.R. 48 (Alta. Q. B.), page 39.

The rule was again succinctly summarized by Master Robertson in *Xpress Lube* at para 47: “**Case law on the delay rule continues to evolve, and it is now clear that time stops when the application is filed**”.

It is clear that the Plaintiff is not able to continue to take steps to advance the action before the Delay Application is heard. This would place the Defendants in an untenable, and extremely prejudicial situation. The Defendants would be forced to either (1) refuse to respond to, or participate in, any further steps taken by the Plaintiff, or (2) continue to participate in the proceedings to ensure their interests are being protected, thereby running the risk of the Court interpreting their actions as acceptance of, or waiver, of the Plaintiff’s delay, and jeopardizing the likelihood of success of their Delay Application under Rule 4.33(2)(b). [paras 44-47] [emphasis added]

[17] In *Rivera*, Moen J. did not cite any authority for her “no further steps possible” conclusion.

[18] In any case, that conclusion is inconsistent with R 4.33(2), which expressly contemplates the possibility of post-filing-of-dismissal-application steps:

4.33(2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

...

(b) **an application has been filed or proceedings have been taken since the delay** and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[19] Poelman J. recognized this in *Ma v Kwan*, 2019 ABQB 89, one of the cases cited in *Darby*:

Presumptively, **the filing of a dismissal for long delay application crystalizes the rights of parties as the date of filing. The relevant period of delay is determined by looking back from the date the application was filed**, not heard: *Flock v Flock Estate*, 2017 ABCA 67, 49 Alta. L.R. (6th) 41, para 17(8) leave to appeal to SCC refused, 37552 (19 October 2017). In the usual course, there should be no further steps in the action until the dismissal application has been decided: *Riviera Developments Inc. v Midd Financial Corp.*, 2002 ABQB 853, 325 A.R. 48, para 39. **That is implicitly recognized by rule 4.33(2), which provides that mandatory dismissal after three years of delay will not occur if the defendant, having made the application, participates in other proceedings “for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.”** The policy for this exception comes from *Trout Lake Store Inc. v Canadian Imperial Bank of Commerce*, 2003 ABCA 259, 31 Alta. L.R. (4th) 243, which expressed a concern about a defendant acquiescing in the delay: paras 28, 29 and 33. *Trout Lake* also recognized “some obligation on the defending party to make its application to dismiss on a timely basis”: para 29.

[20] The third case cited in *Darby* on this point -- *Xpress Lube & Car Wash Ltd v Gill*, 2019 ABQB 326 (Master Robertson) – speaks only to the three-year measuring period i.e. time stopping when a delay application is filed, not to further litigation steps being prevented.

[21] On this point, see also *4075447 Canada Inc v Pacrim Developments Inc*, 2018 ABQB 358 (Master Robertson) (affd by Macleod J.-- unreported decision; in turn affd *4075447 Canada Inc v WM Fares & Associates Inc*, 2020 ABCA 150):

[Counsel for one defendant] describes the plaintiff’s current attempts at trying to demonstrate that the case is almost ready for trial as “disingenuous”. She notes that within the week prior to the first day of oral argument, counsel for the plaintiff served an application to set a trial date. **These steps are clearly being taken now in an attempt to avoid dismissal of the claim, after the applications to dismiss have been brought. Such unilateral steps are not to be taken into account in determining whether the delay has been inordinate and inexcusable:** *Flock v Flock Estate*, 2017 ABCA 67, 2017 CarswellAlta 294 at para. 17, sub-paragraph 8; *Steparyk v Alberta*, 2014 ABQB 367, 2014 CarswellAlta 956, at para. 5; *Riviera Developments Inc v Midd Financial Corp.*, 2002 ABQB 853, 2002 CarswellAlta 1150 at para. 39; and *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259, 2003 CarswellAlta 1321, at para. 32. [para 91 of Master Robertson’s decision] [emphasis added]

[22] All to say: the mere filing of the dismissal-for-delay application by Shahni did not close, and has not closed, the door to further litigation steps.

[23] As a practical matter, and in line with the present ruling, I direct that no further steps be taken on the summary-judgment front until the conclusion (by agreement or decision) of the dismissal-for-delay application i.e. if it is ultimately unsuccessful.

III. Conclusion

[24] For the above reasons, I allow Shahni’s appeal of AJ Smart’s decision to the extent of directing that its dismissal-for-delay application shall proceed first, as a stand-alone application.

[25] I would ask counsel to attempt to identify the remaining pre-application steps on that front (if any) and the associated timing and, failing agreement by September 8, 2025 (as applicable), to send me (via letter to my assistant by September 10, 2025) their separate proposals for such steps (with suggested timing), and I will decide on those steps with timing.

[26] I thank both counsel for their helpful written and oral submissions.

[27] Shahni is entitled to its Schedule C costs of the appeal application.

Heard on the 14th day of May, 2025.

Dated at Edmonton, Alberta this 27th day of August, 2025.

Michael J. Lema
J.C.K.B.A.

Appearances:

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