

MASTERS
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THE LAW COURTS
WINNIPEG, MANITOBA, CANADA
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File No. CI 08-01-57509

Decision delivered: December 20, 2012

Dean Clifford
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Matlock, Manitoba
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D'Arcy & Deacon LLP
Barristers and Solicitors
2200 – One Lombard Avenue
Winnipeg, Manitoba
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Attention: Michael G. Finlayson

BETWEEN:

DEAN CLIFFORD,

plaintiff,

-and-

**AARON ARJOON, LEONARD FRENCH & CO. and
OPTIMUM INSURANCE COMPANY INC.,**

defendants.

On December 14, 2012, the defendants' motion to dismiss the action for delay proceeded before me. The motion is brought pursuant to Rule 24.

The defendants submit that the plaintiff has unreasonably delayed the prosecution of his action and that the action should be dismissed. There is not evidence of specific prejudice. The defendants submit that there was inherent prejudice due to the effluxion of time. The defendants say that the plaintiff has provided no reasonable explanation for the delay in proceeding.

In conjunction with the motion to dismiss the action for delay the defendants have sought to expunge significant portions of the affidavit of Dean Clifford, affirmed August 15, 2012, which was filed by the plaintiff in opposition to the defendants' substantive motion.

Motion to expunge

Having heard the submissions with respect to the motion to expunge significant portions of the plaintiff's affidavit and having considered the affidavit evidence, I am satisfied that much of the affidavit filed by the plaintiff is expungeable. The affidavit contains a significant amount of argument, opinion and speculation, all of which is not properly before the court by way of affidavit. In addition, there is conjecture such as in paragraph 9 where the plaintiff says, "*... and now believes this was yet another "stall tactic".*" That portion of paragraph 9 is clearly not proper evidence and is nothing more than conjecture and argument. Similarly in paragraph 11 the plaintiff deposes that, "*... and believes it has to do with private deals ...*".

Although I favour the approach of not formally dealing with expungement of affidavit content, and prefer hearing general submissions to determining what weight, if any to give to evidence improperly placed before the court in an affidavit, I am prepared to order expungement in this case as follows:

- Paragraph 9 – "and now believes ... tactic".
- Paragraph 11 – "and believes it has to do with private deals ... lucrative clients."
- Paragraph 12 – "Plaintiff, after 1489 days, has reason to believe ... with."
- Paragraph 16 – Entire paragraph;
- Paragraph 17 – Entire paragraph;
- Paragraph 18 – Entire paragraph;
- Paragraph 19 – Entire paragraph;
- Paragraph 20 – Entire paragraph;
- Paragraph 22 – Entire paragraph;
- Paragraph 23 – Entire paragraph.

I am not expunging paragraphs 14 and 15. These paragraphs are deposed by the plaintiff as being within his personal knowledge and the defendants can challenge the evidence by testing it on cross-examination, if they so choose.

Motion to dismiss for delay

The plaintiff has not offered a particularly compelling explanation for his delay in prosecuting his action. Essentially he says that he has been experiencing financial difficulties and dealing with other events in his life that prevented him from giving this litigation the attention that it required. However, a weak excuse

for failing to prosecute litigation is not of itself sufficient to justify the dismissal of an action.

The significant point in this action is that the defendants have not yet filed a statement of defence. They did request particulars and have not received the particulars sought, or a refusal to provide same. However, Rule 25.10(2) provides:

Where the opposite party fails to file and serve the particulars or fails to file and serve a written statement refusing to provide the particulars within ten days, the court may order particulars to be filed and served within a specified time.

The defendants never pursued a motion to compel the plaintiff to provide particulars and, the plaintiff having failed to supply particulars or a refusal, that was clearly the next step in this litigation. Given that the defendants did not pursue the next step and have not presented any substantial evidence of prejudice caused by the delay in this matter, I am dismissing the defendant's motion to dismiss the action for delay at this time. However, I am ordering the plaintiff to either file and serve particulars that were requested, or a written statement refusing to provide the particulars, no later than January 15, 2013. This is not to be construed as an order for particulars pursuant to Rule 25.10(2) but simply an order requiring the plaintiff to comply with his obligations pursuant to Rule 25.10(1.1).

The plaintiff is reminded, as he was at the hearing, that he is the one who initiated this litigation and he is responsible, notwithstanding that he is self-represented, to familiarize himself with the court rules and comply with those rules regardless of whether he believes those rules are fair or not.

I am leaving the costs of this motion in the cause.



F. A. Lee
Master

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