

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY WERNER, DIANE ROBINSON, KEVIN ADAMS,
AND NORTH STAR TAXI LTD.

Plaintiffs

-and-

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER, JACK
ROWE, CHARLIE SCARBOROUGH, KEVIN KULBISKY, DAVID
L'HEUREUX AND SNOWGOOSE TRANSPORTATION COMPANY LTD.
CARRYING ON BUSINESS UNDER THE BUSINESS NAME AND STYLE OF
COURTESY CABS.

Defendants

MEMORANDUM OF JUDGMENT

[1] The defendants Town of Hay River, Rowe, Scarborough and Kulbisky, have applied for an order dismissing this action for delay. When the application first came on for hearing in Chambers, the plaintiff, Harvey Werner, appeared on his own behalf and on behalf of the other plaintiffs. Mr. Werner sought more time so as to gather documents which he said were relevant to this application. I subsequently granted him time to file further submissions. I have now reviewed those submissions, as well as the further submissions of counsel for the defendants. For the reasons that follow, the application is granted.

[2] The Rules of the Supreme Court provide that an action may be dismissed for delay but also provide that an action must be dismissed if there has been delay for more than five years. This is found in Rule 327(1):

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 applicant, where for five or more years no step has been taken that materially advances the action or proceeding.

The defendants base their application on the mandatory aspect of the rule found in subrule (b).

[3] A brief chronology of the steps taken in this action is necessary:

- March 3, 1997 - Statement of Claim filed.
- May 6, 1997 - Statement of Defence filed.
- June 15, 1998 - Plaintiffs completed examinations for discovery of defendants.
- May 7, 1999 - Defendants completed examinations for discovery of plaintiffs.
- May 31, 1999 - Defendants' motion to strike claim and/or assign a case management judge; Order issued requiring plaintiffs to complete undertakings; balance of relief sought adjourned.
- November 22, 2004 - Defendants' motion filed to dismiss for delay.

[4] As can be readily seen, whether one takes the completion of the examinations for discovery on May 7, 1999, or the defendants' motion of May 31, 1999, more than five years elapsed prior to the defendants filing this application to dismiss. Numerous cases from this court have held that Rule 327(1)(b) is mandatory: *Gorf Holdings Ltd. v. Treeshin*, [2002] N.W.T.J. No. 3; *Muckpaloo v. MacKay*, [2002] N.W.T.J. No. 10; *Kell v. Senych Estate*, [2003] N.W.T.J. No. 74. The rule makes dismissal mandatory where no step has been taken for five or more years to materially advance the action.

The rule speaks in absolute terms: the court “shall” dismiss the action. The five-year period is the five years prior to the filing of the motion to dismiss.

[5] Because of the mandatory nature of the rule, cases decided under some discretionary power, such as subrule (a) of Rule 327(1), are not pertinent. The cases referred to by Mr. Werner in his submissions fall under that category. Those cases are from other jurisdictions with different procedural rules.

[6] Mr. Werner submitted that delays in prosecuting were due in part to negligence by his former solicitors. He offers no evidence in this regard but, in any event, it too is irrelevant for the purpose of this application. Nothing I do in the context of this action affects his right to pursue an investigation by the Law Society into the conduct of his former solicitors or to prevent him from suing those solicitors for negligence.

[7] Mr. Werner also pointed to evidence of settlement negotiations. During the period of 2001 and 2002, a settlement offer was made by these defendants’ insurers. That offer was never accepted. Also, there were communications between solicitors regarding the possibility of conducting some judicial alternative dispute resolution proceeding (such as a mini-trial). Nothing came of those initiatives.

[8] As I discussed in *Muckpaloo v. MacKay* (*supra*), settlement negotiations and discussions between solicitors do not come within the concept of a step taken to materially advance the action, as stated in Rule 327(1)(b). A step is some act furthering the action so as to move it to trial. These types of steps will normally be either procedural steps based on the rules of court taken in the course of litigation or some act, in replacement for a procedural rule, whereby the action moves closer to trial. That is not what happened here.

[9] I note as well that the rules provide an escape clause from the mandatory application of Rule 327(1)(b). Rule 330 provides that the parties to an action may by agreement exclude the application of the delay rules. So, if parties want to take time to negotiate they can, but only if they agree to waive the operation of the rules. There was no such agreement in this case.

[10] For these reasons, the action against these defendants is hereby dismissed with costs on the appropriate party-and-party basis.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 8th day of February, 2005.

Counsel for the Defendants (Applicants): Jonathan W. McCully
Mr. Harvey Werner appeared in person on behalf of the Plaintiffs (Respondents).