CITATION: Sankreacha v. Cameron J. and Beach Sales Ltd., 2019 ONSC 1313
COURT FILE NO.: CV-17-129350
DATE: 20190225

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bharath Sankreacha, Plaintiff

AND:

Cameron J. and Beach Sales Ltd., John Cowan, JMC Legal Services Inc., and Rod Brennan, Defendants

BEFORE: The Honourable Mr. Justice R.E. Charney

COUNSEL: James Jagtoo, Frances Jagtoo, Counsel, for the Plaintiff

Martin A. Smith, Desneiges Mitchell, Marla Rosenblatt-Worth, Counsel for the Defendants, Cameron J. and Beach Sales Ltd. and Rod Brennan

Andrew W. Graham, Counsel for the Defendants, John Cowan and JMC Legal Services Inc.

HEARD: In-Writing

COSTS ENDORSEMENT

[1] On December 3, 2018, following a 15 day trial in May and June of 2018, and one day of submissions in September 2018, I dismissed the plaintiff's claim for wrongful dismissal, inducing breach of contract, injurious falsehood, intentional infliction of mental distress, defamation, false imprisonment, malicious prosecution, and civil conspiracy.

[2] The parties were unable to agree on costs and have provided written submissions.

[3] The first defendants were Cameron J. and D. Beach Sales Ltd. and Rod Brennan, an employee of Cameron J. and D. Beach Sales Ltd. (the Beach defendants). They were represented by the same law firm.

[4] The Beach defendants seek substantial indemnity costs (calculated at 90% of actual costs) in the amount of $581,694. In the alternative, they claim costs of $425,000 on a partial indemnity basis.

[5] The other defendants were John Cowan and JMC Legal Services Inc. (the Cowan defendants). They seek costs on a substantial indemnity basis in the amount of $231,621, and $166,000 on a partial indemnity basis.

[6] The defendants argue that the plaintiff's amended Statement of Claim set out nine causes of action and fourteen heads of damages and claimed $2 million damages. The plaintiff's

closing submissions advanced every single cause of action in the amended Statement of Claim and sought damages of $1.5 million.

[7] The litigation continued for seven years before the trial, and the defendants were entirely successful in defending the action.

[8] Costs must be awarded in accordance with the factors listed in rule 57.01 and, if there are offers to settle, rules 49.10 and 49.13.

[9] In *Roy Wise v. Colaco*, 2015 ONSC 7922, Firestone J. stated at para. 31:

> Fixing of costs is not merely a mechanical exercise in reviewing the receiving party's Cost Outline. In *Andersen v. St. Jude Medical Inc.* (2006), 2006 CanLII 85158 (ON SCDC), 264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:
>
> > 1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1)…
> >
> > 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case... The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
> >
> > 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
> >
> > 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results"...
> >
> > 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice... (Citations omitted)

[10] An important principle for the awarding of costs is that the sum awarded reflect the fair and reasonable expectations of the unsuccessful litigant. In *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.) at para. 24 the Court of Appeal stated:

> While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 2002 CanLII 25577 (ON CA), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:
>
> > In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

[11] In the case of *Paniccia v. MDC Partners Inc.*, 2018 ONSC 1775, Perell J. stated (at para. 6):

> The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case. In some cases, it may be reasonable for the successful party to make exhaustive efforts and to commit enormous legal resources, and in those cases, it might be said that the unsuccessful party could reasonably expect to pay those costs. In other cases, however, the successful party may have been well served by giving his or her lawyer instructions to make exhaustive efforts, but it might be disproportionate and unreasonable to expect the unsuccessful party to pay those costs, even if he or she would have expected or anticipated that his or her foe would have marshalled those legal resources.

[12] The defendants made several offers to settle in an attempt to avoid the trial:

(a) March 11, 2015: $110,000

(b) August 10, 2017: $140,000

(c) March 6, 2018: $265,000

(d) April 30, 2018: $210,000 (offer from the Beach defendants only)

[13] The costs consequences of Rule 49.10 do not apply to award substantial indemnity costs to a defendant (*St. Elizabeth Home Society v. Hamilton (City),* 2010 ONCA 280, at para. 90; *Conforti (Re)*, 2015 ONCA 708, at para. 17).

[14] In *AB2000 Software Corporation v. Infinium Capital Corporation*, 2015 ONCA 829, the Ontario Court of Appeal stated, at para. 41:

> [A]s this court explained in *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, 319 D.L.R. (4th) 74, at para. 90, "there is no corresponding provision entitling a defendant to substantial indemnity costs where it makes an offer to settle that is greater than the amount ultimately awarded." Costs on a substantial indemnity basis will only be

> warranted where the trial judge finds that the behaviour of the plaintiff was so egregious as to deserve a sanction: *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 312 D.L.R. (4th) 278, at para. 40; *St. Elizabeth Home Society*, at para. 92.

[15] Similarly, in *Conforti* the Court of Appeal stated the situations where full indemnity costs are appropriate:

> An award of substantial or full indemnity costs may be based on conduct including circumstances where there has been "reprehensible, scandalous, or outrageous conduct on the part of one of the parties": *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134. As stated by Robins J.A. in *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA), 1993 CanLII 568 (ON CA), 17 O.R. (3rd) 1 (C.A.) at p. 23, such an award "is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of the party in the litigation."

[16] Rule 49.13 does provide that the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made, and the terms of the offer. The fact that wholly successful defendants were prepared to compromise by presenting a substantial settlement offer is a relevant consideration in the defendants' favour.

[17] The defendants argue that counsel for the plaintiff's conduct was egregious because plaintiff's counsel repeatedly raised the threat of seeking personal costs against counsel for the defendant in an effort to intimidate him. The correspondence provided confirms this.

[18] As a result of these baseless threats, defendants' counsel was required to report himself to LawPro, which ultimately resolved the matter when plaintiff's counsel agreed not to make any claim for costs against defendant's counsel personally and to withdraw all such claims. LawPro agreed not to seek costs that it incurred as a result of retaining counsel to respond to these claims.

[19] While the plaintiff's conduct in making baseless threats to seek costs personally against opposing counsel may be described as "reprehensible, scandalous, or outrageous" or "so egregious as to deserve a sanction", the plaintiff did agree with counsel for LawPro, prior to trial, to abandon all such claims on a without costs basis. Given that agreement, it would not be appropriate to order costs against the plaintiff on a substantial indemnity basis.

[20] The defendants argue that the plaintiff unnecessarily lengthened the proceeding by raising nine causes of action when the case could have proceeded as a simple wrongful dismissal claim. I agree with this assessment. If the plaintiff was going to succeed, it would have been based on his wrongful dismissal claim, and the other claims were mostly redundant. Given the overlapping facts, however, these additional claims did not add more than a couple of days to the trial.

[21] In addition, the plaintiff made unsubstantiated allegations that the defendants were involved in a credit card fraud scheme with organized crime. This allegation was not pled in the amended Statement of Claim, but appeared to evolve as plaintiff's counsel submitted his case. At the end of the day, I found that there was no evidence to support this allegation.

[22] While an unsubstantiated allegation of fraud can expose a party to substantial indemnity costs, in this case it was not only the plaintiff who made this allegation: the defendants also pled that the plaintiff was involved in the credit card fraud. This was the basis for their "after acquired cause" defence, which was ultimately abandoned the year before trial. In the result, the plaintiff did not plead fraud, but argued it at trial; the defendants did plead fraud, but abandoned the allegation prior to trial. The parties' respective allegations of fraud related to the same set of facts: the "pin pad fraud" discussed in paras. 57 – 79 of the decision. In these circumstances I conclude that the fraud allegations effectively cancel each other out, and do not give rise to substantial indemnity costs in the circumstances of this case.

[23] The plaintiff argues that on May 1, 2018, he made a reasonable offer to settle the case for $400,000, and that the defendants should have capitulated rather than incur combined costs of $750,000. Given that the defendants were wholly successful, and the plaintiff turned down offers to settle of over $200,000, I do not see how the plaintiff's offer to settle for $400,000 is relevant to the costs analysis.

[24] The plaintiff also argues that the costs for his motion to amend his pleadings ($42,000), which were reserved by the Master to the Trial Judge, and his costs for the defendants' unsuccessful motion at the beginning of the trial to call similar fact evidence ($14,000) should be deducted from any costs award granted to the defendants.

[25] Given that the plaintiff was ultimately unsuccessful on the merits in relation to the claims raised in the amendments to his pleadings, I am of the view that no costs should be awarded to either side with respect to that motion. I will make an appropriate reduction from the defendants' costs to reflect this decision. In any event, the $42,000 claimed for that motion by the plaintiff is, in my view, excessive.

[26] Finally, the plaintiff argues that the defendants maintained their "after acquired cause" defence until April 2017, and that this had the effect of prolonging the litigation and increasing costs. As indicated above, the defendants' after acquired cause defence, and the plaintiff's allegation that the defendants were involved in credit card fraud with organized crime, related to the same set of facts. Since the plaintiff maintained this position even after the defendants abandoned theirs, I do not see how the defendants' position actually increased costs for the plaintiff or prolonged the litigation. I have taken the defendants' position on after acquired cause into account as part of my decision to deny the defendants' claim for substantial indemnity costs, but I do not see how it can be used to reduce the defendants' claim for costs on a partial indemnity basis.

[27] The plaintiff does not dispute the reasonableness of the hourly rates charged or the quantity of work done. Indeed, given the plaintiff's claim of $42,000 costs to argue the

limitation period issue on his motion to amend the Statement of Claim, he can hardly argue that the hours claimed by the defendants for the 15 day trial and the preparation leading up to the trial are excessive. Apart from the scale of costs, the plaintiff does not appear to challenge or dispute the quantum claimed.

[28] Based on these considerations, and taking into account the factors set out in Rule 57.01, costs are fixed at $375,000 all inclusive in favour of Cameron J. and D. Beach Sales Ltd. and Rod Brennan, and $150,000 all inclusive in favour of John Cowan and JMC Legal Services Inc., payable by the plaintiff forthwith.

Justice R.E. Charney

Date: February 25, 2019