<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Ryan v. Sleigh*, 2007 NSSC 284

Date: 20071002
Docket: SH 256256
Registry: Halifax

Between:

Crystal Ryan

Plaintiff

v.

Lorna Sleigh, Kenneth Sleigh and
The Guarantee Company of North America

Defendants

DECISION ON COSTS

Judge: The Honourable Justice M. Heather Robertson

Written Submissions: July 16, 27, and 30, 2007

Written Decision: October 2, 2007

Counsel: Eric K. Slone, for the plaintiff
Colin D. Bryson and Moneesha Sinha, Articled Clerk, for the defendants

Robertson, J.:

[1] A decision was rendered in this matter on July 5, 2007. This is a supplemental decision dealing with costs, having received counsels' submissions.

[2] At trial the plaintiff was awarded $25,800 exclusive of prejudgment interest representing life insurance proceeds, which were to have been held in Trust for her by the defendants, until she became 19 years of age.

[3] Prior to trial in October 2006, the plaintiff had presented an offer to settle for the "sum of $33,800, inclusive of claim and prejudgment interest." The offer was never revoked and the trial judgment fell short of the offer by approximately $900. The defendants made no offer to settle.

[4] In determining an award for costs, the amount to which the tariff applies is the amount recovered, exclusive of interest. This is well established law.

[5] The amount therefore is $25,800. The defendant submits that in applying the Tariff A the court should consider this to be a $25,000 claim. The scale is a sliding scale however and amounts between $25,000 and $40,000 merit an award of $6,250 in costs using Scale 2 (basic). Scale 3 in this range would allow an award of $7,813.

[6] The length of trial was two days which therefore attracts an additional $2,000 per day, although defence counsel urges the court to consider an award of $3,500 for length of trial.

[7] With respect to the offer to settle, since the offer was $900 more than the amount awarded rule 41A.09 does not apply. However, the plaintiff urges the court to consider rule 41A.11 which reads:

> Discretion of court
>
> 41A.11. Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[8] Mr. Bryson submits that the court should not exercise its discretion simply because the party that made the offer was close, citing *Ismaily (Guardian ad litem of) v. Dartmouth Surplus Limited* (1992), 114 N.S.R. (2d) 171, where the defendants' offer was $600 less than the amount awarded of $43,000 plus interest.

[9] This case can be distinguished obviously as here we have defendants who did not respond to the offer and made none themselves. I do understand however that Mr. Bryson took over the carriage of the case some seven months before trial and that the defendants had been represented by earlier counsel, one of whom died and the other no longer practising.

[10] The defendants as Mr. Slone points out were trustees who owed a high degree of accountability to the court and the plaintiff beneficiary.

[11] I am in agreement that in the circumstances of this case the court should use its discretion and award additional costs pursuant to rule 41A.11. I do not have particulars of the additional costs related to trial preparation between the time the settlement offer was made and the trial itself, but I recognize that there were obvious additional costs incurred. Therefore, an award of costs based on the premium Scale 3 (+25%) is appropriate.

[12] Accordingly, I award costs in the amount of $7,813 plus $4,000 for the two-day trial for a total of $11,813 plus disbursements in the amount of $1,464.06 which are agreed upon.

[13] Mr. Bryson has suggested certain language be used relating to the defendant The Guarantee Company of North America who will honour the bond that secured the obligations of the trustees. If plaintiff counsel is in agreement this wording can be incorporated in the final order.

Justice M. Heather Robertson