IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Trim v. Beaudet, 2003 NSSC 238

Date: 20031219
Docket: S.H. No. 178515
Registry: Halifax

Between:

Faye Trim

Plaintiff

-and-

Nathan Beaudet and City Motors Limited c.o.b. City Mazda

Defendants

Supplemental Decision on Costs

Judge: The Honourable Justice Robert W. Wright

Written Submissions: November 17, 25 and 26, 2003 in Halifax, Nova Scotia

Written Decision: December 19, 2003

Counsel: Plaintiff's Counsel - Jason Gavras

Defendant's Counsel - Peter Rumscheidt

[1] This is a supplementary ruling on costs following the release of my reserved decision on the trial of this action reported as 2003 N.S.S.C. 216. Written submissions have since been filed with the court as requested.

[2] I will first outline some further background of this litigation relevant to the submissions on costs. The action was originally commenced in the Small Claims Court of Nova Scotia seeking the return of the plaintiff's $500 deposit. Once the claim was amended, however, to include claims for general damages of $1,000 as well as aggravated and punitive damages, the action was transferred to the Supreme Court of Nova Scotia because of the extremely limited jurisdiction of the Small Claims Court to make damages awards. The transfer of the proceeding to this court was made with the consent of the defendants.

[3] Once in the Supreme Court, counsel for the plaintiff was able to avail himself of pre-trial procedures including examinations for discovery. It was in the course of the initial discovery examinations that counsel for the plaintiff learned of the existence of a standard form Vehicle Lease Agreement which the defendant dealership would have required the plaintiff to sign before she could take delivery of the car. This document was not produced in the defendants' List of Documents and was only provided to plaintiff's counsel after repeated requests for a copy were made. This document proved to be highly relevant and indeed had an important bearing in the court's determination that there was no *consensus ad idem* reached between the parties during their negotiations (see paras. 34-35 of the trial decision).

[4] Shortly after the production of this document in late April, 2003, Mr. Scarff was also examined on discovery. It was only on reviewing the documents during his discovery examination that Mr. Scarff realized that the dealership had made a mistake by inadequate disclosure to the plaintiff about the nature and terms of the intended transaction and was not in a position to win the case. He therefore paid into court the plaintiff's $500 deposit on June 24, 2003 (see para. 36 of trial decision).

[5] Before outlining the other offers of settlement exchanged by the parties, I must first address the submission by counsel for the defendants that given the dismissal of the plaintiff's claims for damages at trial, this proceeding should have been dealt with by the Small Claims Court all along, where costs would have been kept to a minimum. I do not accept that submission. First of all, the claims for damages made by the plaintiff were not spurious and were pursued with the evidence gained, through discovery examinations, of the defendants' poor business practice of the day (described at paras. 34-35 of the trial decision). Although the plaintiff's claims for damages were ultimately not successful, they were nonetheless fairly arguable issues to be tried. Moreover, without the pre-trial discovery procedures undertaken, all of the relevant facts would not have been before the court for the proper disposition of the case. Accordingly, the plaintiff cannot be faulted or penalized in costs for prosecuting this action in the Supreme Court and the determination of costs should go forward on that basis under the governing principles of Civil Procedure Rule 63.

[6] Civil Procedure Rule 63.03(1) provides that unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event. It has been stated on countless occasions, however, that costs are clearly in the discretion of the court and that this discretion must be exercised judicially (see, for example, *Lienaux et al. v. Toronto-Dominion Bank* (1997) 159 N.S.R. (2d) 305 at para. 33). In exercising its discretion, the court is entitled to consider any matter relevant to the question of costs including the factors enumerated in C.P.R. 63.04(2) as well as any offers of settlement made along the way.

[7] In the latter regard, the plaintiff's counsel made a series of settlement offers beginning with his demand letter sent to the corporate defendant on April 2, 2002. In that letter, the plaintiff sought the return of her $500 deposit plus an additional $150 for legal fees. On January 29, 2003 a further offer of settlement was made for recovery of the $500 deposit plus $1,000 in costs plus disbursements. As the costs of the litigation increased, plaintiff's counsel upped the ante during the summer months of 2003, offering to settle for recovery of the $500 deposit plus $2,000 in costs plus an additional $1,145.51in disbursements. By a final offer of settlement made a week before trial, the plaintiff resurrected a previous offer for the return of the deposit plus $1,000 in costs plus disbursements.

[8] Apart from paying the $500 deposit into court on June 24, 2003 (and an additional $125 in costs on September 10, 2003), the only other offer of settlement that appears to have been made by the defendants was on October 17, 2003 at which time the defendants offered to contribute $500 towards the plaintiff's costs and disbursements in addition to the return of the $500 deposit, in satisfaction of

the whole of the plaintiff's claim. That offer was unacceptable to the plaintiff.

[9] Although successful at trial in escaping liability for damages, defence counsel acknowledges the counter argument that it was only after the discovery of Mr. Scarff that the corporate defendant offered to return the deposit. He therefore states that his client is prepared to forego seeking the recovery of costs on behalf of the corporate defendant, submitting that in all of the circumstances, the plaintiff and corporate defendant should bear their own costs as between each other. He goes on to submit, however, that the first named defendant Nathan Beaudet ought to recover costs separately, having been unnecessarily named as a party defendant. The amount sought is $1400 plus taxable disbursements, it being suggested that the court use Scale 2 and an amount involved of $10,000 under Tariff A.

[10] The lead position of plaintiff's counsel, on the other hand, is that his client should be fully indemnified for her legal expenses by an award of solicitor-client costs. This position is advanced essentially on two footings, namely, to mark the court's general disapproval of the conduct of the defendants in the litigation and because the litigation itself should be regarded as having been totally unnecessary from the start had the defendants acted responsibly on receipt of his initial demand letter. In conjunction with that position, plaintiff's counsel has provided to the court a copy of his statement of account submitted to the plaintiff dated November 24, 2003 which totals $15,300. That figure is comprised of legal fees for his own time of $11,340, an additional $750 to cover the time of an articling student, disbursements of $1,342.10 and taxes where applicable.

[11] As alternative positions, plaintiff's counsel suggests an award of full indemnification of solicitor-client costs up to the mark of one half day of trial (given the outcome of the case) or an award of a lump sum amount that substantially indemnifies the plaintiff for her litigation costs.

[12] As recognized earlier, costs normally follow the event unless the court otherwise orders in the exercise of its discretion. As also noted in *Lienaux* (at para. 34), a party's conduct both before and during the litigation process, as well as the degree of success achieved, are relevant to the exercise of the court's discretion as to costs.

[13] Although the conduct of the corporate defendant was not so egregious as to attract an award of aggravated or punitive damages, I have concluded that the court's disapproval of that conduct should sound in costs. The court's disapproval finds expression in two respects.

[14] First, it engaged in a manifestly poor business practice by using misleading documentation when negotiating the deal and holding back the Vehicle Lease Agreement which the customer was ultimately expected to sign before taking delivery of the car. As I wrote in my earlier decision (at para. 35), the failure of the transaction can be laid squarely at the feet of the defendant dealership because of that poor practice which lead to this litigation. On top of that, the defendants neglected to produce a copy of the Vehicle Lease Agreement to their solicitor for inclusion in a Rule 20 List of Documents, which was only forthcoming after repeated demands for its production after discovery.

[15] Secondly, the defendant dealership acted in a careless and irresponsible manner in responding to the demand letter from plaintiff's counsel for the return of the deposit. Mr. Gavras specifically stated in his letter that his client thought she was entering into a purchase and sale agreement but was later told by Mr. Beaudet that she had entered into a lease with a buyout at the end of the term. He further noted that the document provided to him made no mention of a lease. Ironically, Mr. Scarff's dismissive and brusque letter of reply to Mr. Gavras dated April 12, 2002 began with the exhortation that Mr. Gavras should read the signed contract to save them both time from such foolishness, when it became obvious from Mr. Scarff's testimony that he himself had not bothered to read the signed contract until his discovery examination over a year later. Had he read the contract documentation at the time that the return of the deposit was first requested, he would have realized at the outset (as he did a year later), that the dealership had made a mistake by making inadequate disclosure to the plaintiff over the nature and terms of the transaction and could not win the case. It can readily be inferred that had he taken the simple step of reading the contract when the demand letter was received, he would have made the same decision then to return the deposit as he did a year later and this entire litigation could have been avoided.

[16] I would adopt the principle expressed in *Shier v. Fiume* (1992) 6 O.R. (3d) 759, that a party who has full disclosure of his opponent's case should be obliged to assess whether he has any evidence on which to make a reasonably arguable case. That was not done in a timely manner in the present case even though the key document referred to in Mr. Gavras' letter was already in the defendants' possession . This was, by extension of the words of Civil Procedure Rule

63.04(2)(g), the neglect of a party to make an admission which should have been made earlier.

[17] In summary, because of the court's disapproval of the conduct of the corporate defendant in both respects above described, but for which this litigation would have been totally unnecessary, I conclude that the plaintiff ought to be awarded costs notwithstanding that her damages claims were not successful at trial. The question then becomes the extent to which the plaintiff should recover her litigation costs.

[18] As the courts in this province have repeatedly stated (the *Lienaux* case being one of several examples), the test for an award of solicitor-client costs is that they should only be ordered in rare and exceptional circumstances to mark the court's disapproval of the conduct of the party in the litigation. After canvassing a number of cases annotated in the Civil Procedure Rules (under Rule 63), and the further series of cases reviewed by Justice Saunders in *Campbell v. Lienaux* [1997] N.S.J. No. 314 (at para. 13), I conclude that this is not an appropriate case in which full indemnity for the plaintiff's legal expenses should be awarded. Not only is the corporate defendant's conduct not egregious enough to warrant an award of solicitor-client costs, but the plaintiff herself was unsuccessful in proving her damages claims at trial. I therefore prefer to adopt the approach that was taken by the court in *Hall v. R.* (1998) 163 N.S.R. (2d) 106. Justice Gruchy there dealt with the matter of costs in a situation where the Crown originally rejected a claim of solicitor-client privilege in respect of documents seized from the applicant doctor's office. Eventually, the Crown reversed its position and agreed to an order

recognizing the privilege. Justice Gruchy declined to make an award of solicitor-client costs notwithstanding his disapproval of the actions of the Crown and instead exercised his discretion with an award of a substantial gross sum in lieu of taxed costs pursuant to Civil Procedure Rule 63.02(1)(a) (amounting to 94% of the doctor's legal costs).

[19] In similarly exercising the court's discretion in the case before me, and having regard to the detailed statement of account submitted to the plaintiff by her counsel to which a substantial contribution should be made, I award to her the gross sum of $10,000 in lieu of taxed costs. In addition, the plaintiff will be entitled to recover her disbursements in the aggregate of $1,342.10. It follows that any applicable HST is allowed in relation to qualifying disbursements only, and not to the fee component of the party and party costs (see *Roose v. Hollett et al.* (1997) 154 N.S.R. (2d) 161 (N.S.C.A.).

[20] It remains to be added that these costs should be recoverable by the plaintiff as against the corporate defendant only. I agree that Mr. Beaudet was not a necessary party defendant in this proceeding where he was at all times acting in the course of his employment as business manager and not in any individual capacity. His joinder did not, however, add any further dimension or interest to the proceeding either in the issues raised, the retention of counsel, or the evidence called. It therefore does not warrant a separate consideration for an award of costs in his favour as argued by defence counsel.

[21] I will await the appropriate order from counsel consented to as to form in due course.

J.