IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Smith v. O'Flynn, 2008 NSSC 2

Date: 20080104
Docket: SH 205836
Registry: Halifax

Between:

Janice Mary Anne Smith

Plaintiff

v.

Patrick Hugh D. O'Flynn, Hugh D. O'Flynn, Normand G. LeGault, Royal & SunAlliance Insurance Company of Canada, a body corporate, and City Motors Limited, a body corporate

Defendants

and

The Co-operators General Insurance Company, added pursuant to the *Insurance Act*, R.S.N.S. 1989, c. 231, Section 133(14)

Third Party

Judge: The Honourable Justice Glen G. McDougall

Heard: December 19, 2007, in Halifax, Nova Scotia

Counsel: Donn Fraser, on behalf of Royal & SunAlliance Insurance Company of Canada
David W. Richey, on behalf of Janice Mary Anne Smith
Patrick Hugh D. O'Flynn, on his own behalf
Hugh D. O'Flynn, on his own behalf

By the Court:

[1] An interlocutory application to decide which one of two insurance companies should be required to respond to a claim for damages arising out of a motor vehicle accident was heard by me in Chambers beginning on December 12, 2006. After a brief hearing the matter was adjourned and completed on December 29, 2006. A written decision was released on July 11, 2007 leaving it to the various parties to attempt to reach an agreement on costs failing which the Court would accept the written submissions of counsel no later than thirty days from the date of the decision. This deadline was extended at the request of counsel who were diligently attempting to resolve the issue without further involving the Court.

[2] Counsels' efforts resulted in an agreement on costs with one exception. The unsuccessful applicant could not reach agreement on costs with the plaintiff. The Court is therefore asked to resolve the issue. Counsel for the plaintiff is seeking costs against Royal & SunAlliance Insurance Company of Canada (hereinafter referred to as "RSA") and Patrick Hugh D. O'Flynn and Hugh D. O'Flynn who are self-represented defendants in the main action.

[3] The costs application was initially scheduled to be heard on October 23, 2007. Deadlines were set for the filing of affidavits and briefs. Unfortunately, counsel for the plaintiff was late in filing certain supplementary affidavits and his self-styled "rebuttal brief" which necessitated an adjournment of the hearing to December 19, 2007. The hearing on costs went ahead on that day. Ironically, the time required to resolve the costs issue was roughly comparable to the time taken to argue the initial application.

[4] The main reason for this was plaintiff counsel's insistence on asking this Court to treat the interlocutory application as a trial. His position emanated from an earlier order of this Court that stated:

> The issues concerning insurance coverage shall, pursuant to Rule 25.01(1)(f), be severed and tried separately prior to the main trial of this action, at such time and in such manner as is determined by the Defendant, Royal & SunAlliance Insurance Company and the Third Party, The Co-operators General Insurance Company, or failing such agreement, by the Court."

[5] Plaintiff's counsel argued that the use of the words "*...be severed and tried separately...*" somehow converted the application, which proceeded by way of an

agreed statement of facts drafted by counsel for the two insurance companies, to a trial.

[6] To further bolster his clients claim for costs, a series of affidavits and supplementary affidavits were filed attaching time records and disbursement summaries attributed to the resolution of this issue. In total these unbilled time and disbursement records exceed $50,000.00.

[7] Some of the time expended on the file by plaintiff's counsel involved discoveries that had to be conducted in order to properly prepare for the main application. Further time was expended trying to force one of the self-represented defendants to comply with certain undertakings arising out of the discoveries. This eventually led to a contempt proceeding against the delinquent party. In resolving the issue the Court ordered the uncooperative party to pay costs of $1,800.00 to be shared equally by the two insurance companies and the plaintiff.

[8] After this log jam was cleared the matter then proceeded quite expeditiously. Counsel for the two insurance companies managed to prepare an "Agreed Statement of Facts" which certainly helped to speed up the process. There was a short adjournment of the hearing to allow them time to prepare the Agreed Statement of Facts but in the long run this saved considerable time and expense.

[9] Plaintiff's counsel suggests that if not for his constant interventions the matter would have continued to languish. While taking credit for moving the matter along he does, however, acknowledge that the issue was one that mainly involved counsel for the two insurance companies.

[10] On this latter point he is correct. The two insurance companies were indeed the main adversaries at the hearing. They did not cause the delay in bringing the matter forward. That was caused mainly by the self-represented defendant who refused or otherwise failed to fulfil undertakings arising out of the discovery. The plaintiff has already been awarded costs for this. I see no reason to re-visit what has already been properly decided by one of my colleagues.

[11] I am also not persuaded to award costs on an application as if it was tantamount to a trial. It was a serious issue as between the two insurance companies but it was dealt with by way of application. Although costs are always at the discretion of the Court, the exercise of that discretion must be based on principle and reason. Civil

Procedure Rule 63 provides guidelines on how to determine costs. Tariff C which was created pursuant to sub-section 2(3) of the *Costs and Fees Act* provides specific guidelines for Chambers applications.

[12] The original application lasted more than one-half day but less than a full day. The Tariff C range of costs for an application of this nature and duration suggests costs in the range of $1,000.00 to $2,000.00.

[13] Affidavit evidence disclosed the amount which the successful party to the application agreed to accept. RSA paid $3,000.00 to the Co-operators General Insurance Company. This figure was disclosed to the Court with the consent of counsel for the Co-operators. And, as previously indicated, costs for the other parties who chose to participate were also agreed upon although the exact amounts were not disclosed.

[14] The plaintiff had a right to participate in the hearing if she felt it necessary. It was, however, primarily an issue between the two insurance companies. The submissions of counsel for the plaintiff really did little to assist the Court in deciding the insurance issue. He was mainly concerned with costs for his client. By taking an unreasonable position he has only added to his client's costs. RSA should not be expected to pay costs over and above the Tariff amount. I set the amount at the low end of the range because of the unnecessary time and expense RSA has been put to by the plaintiff.

[15] After considering all of the relevant factors I order RSA to pay costs of $1,000.00 to the plaintiff which payment shall be made no later than Monday, February 4, 2008.

[16] I will not order costs for or against either of the self-represented "O'Flynn" defendants. Any delays occasioned by their involvement has already resulted in a cost award in favour of the plaintiff and the two named insurers. Their involvement did not otherwise make any appreciable difference in either the time it took to hear the application or the eventual outcome.

McDougall, J.