IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Force Construction Ltd. v. Campbell, 2008 NSSC 310

Date: 20081024
Docket: SH 213071
Registry: Halifax

Between:

Force Construction Limited

Plaintiff/
Defendant by Counterclaim

and

Tammy Campbell

Defendant/
Plaintiff by Counterclaim

DECISION ON COSTS

Judge:	The Honourable Justice Kevin Coady
Heard:	March 3-7, 2008 & April 1 & 2, 2008, in Halifax, Nova Scotia
Written Submissions:	September 8, 2008 & September 29, 2008
Decision:	October 24, 2008
Counsel:	Cory Withrow, for the plaintiff Allen Fownes, for the defendant

By the Court:

[1] This trial was heard over seven days in early March and early April, 2008. The court issued a 71 page decision on May 16, 2008. The last paragraph of the decision stated:

> I will accept written submissions on costs if the parties request such relief. However I will state that this is one of those cases where there is no clear winner. Also, I find that both parties contributed to the circumstances that led to this trial.

[2] Notwithstanding these words Force Construction Limited indicated that they wished to make submissions on the recovery of costs, disbursements and pre-judgment interest.

[3] On September 8, 2008 I received submissions from Ms. Campbell. She advances the position articulated by the court, that is, "that the parties should bear their own individual costs." Alternatively she proposes a set off approach.

[4] On September 29, 2008 I received submissions from Force Construction Limited. They point out that they made a Rule 41A formal offer to settle on May 25, 2007 in the amount of $67,800 ($60,000 plus HST). This offer was not

accepted by Ms. Campbell and she recovered $64,147.85 after trial. Additionally they argue that they were more successful than Ms. Campbell and that Ms. Campbell was the party most responsible for the necessity of the trial. Force Construction Limited seeks $10,045.00 in trial costs, $850.00 in previously awarded costs, $5,092.57 in disbursements and prejudgment interest of $10,643.24 for a total of $26,630.81.

[5] The question is whether my after trial perception should be disturbed as a result of the above submissions.

[6] I found both parties to be hostile and aggressive towards each other. They were stubborn and not prepared to give an inch. I observed their court reactions to the evidence and their disdain for each other. It was clear to me that they could not see the strengths in their opponents case or the weaknesses in their own. I have no hesitation in saying that the only way this dispute could be resolved was by way of a trial.

[7] There is no clear winner in this case. In fact this is one of those cases where success and failure are shared almost equally. Ms. Campbell was successful on

issues relating to the septic system, the in-floor radiant heating system, the laundry room drain, the outdoor drainage system, the heating system and various other smaller items. Force Construction Limited was successful on deficiencies, aspects of the septic system, exterior wall insulation and various other smaller items. Additionally the plaintiff was fully successful on the counterclaim.

[8] There were problems associated with the construction of this home where both parties contributed materially. This was clearly the case with deficiencies. Force Construction Limited were often sloppy in their construction. Ms. Campbell refused to recognize proper deficiencies that should have been resolved pursuant to the building contract. There is also an element of this joint contribution in relation to the septic system.

[9] The following are factors working against Force Construction Limited's position on costs:

- The septic system installation brought Ms. Campbell to tears and I have described it as a "circus". It was unwise for them to continue with the peat system when the conventional system proved

unworkable. Force Construction Limited did not have the skills required to effectively install the peat system. This failing has effected the property from an aesthetic and future cost perspective.

- The in-floor heating system turned into a disaster for both parties but it was Force Construction Limited that created this problem. I am satisfied that they employed unskilled workers who were unable to follow installation instructions properly. The fact that the system extended outside of exterior walls and that nails were driven through piping supports this conclusion.

- The plaintiffs behaviour in relation to the laundry room is egregious and went a long way to create distrust on the part of Ms. Campbell. They recognized that they had “missed it” during construction. They developed a “thrown together” solution that did nothing other than to dupe the owner into thinking the problem was solved.

- The plaintiff accepted at least $39,000.00 in cash outside of the building contract. It was the parties dark little secret until everything fell apart. This fraudulent behaviour on the part of both contributed to the parties sense of mistrust and suspicion.

[10] There are a number of factors attaching to Ms. Campbell that, no doubt, led to her position that she would not seek costs. They are as follows:

- Ms. Campbell's role in a fraudulent cash payment that may have been as much as $59,000.00

- Ms. Campbell caused the breach in this contract by not paying anything for the house construction notwithstanding she took possession.

- Ms. Campbell's counterclaim was entirely unsuccessful because she had no evidence to support these claims.

- Ms. Campbell's failure to allow the builder the contractual right to correct the deficiencies.

- Ms. Campbell advanced a large and complex claim surrounding the installation of the levelwall insulation without supporting evidence.

[11] In light of the above referenced factors, I find that both parties contributed to the length of the trial, the complexities of the issues and the attitude of the parties leading up to, and during, the trial.

[12] The only new factor contained in the plaintiff's submissions is that they made a Rule 41A offer to settle on May 25, 2007 in the amount of $60,000.00. This offer was not accepted and the plaintiff was awarded $64,147.85. On the basis of this result the plaintiff feels greater entitlement to costs generally and double costs after May 25, 2007.

[13] **Civil Procedure Rule 41A.09(1)** states:

> 41A.09.(1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where that plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, that plaintiff shall be entitled to party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs.

[14] **Civil Procedure Rule 41A.11** states:

> 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.

[15] The latter allows this court to consider or not consider an offer to settle in the exercise of its discretion as to costs. It is important that courts support **Rule 41A** offers when assessing costs post trial. However, in this particular case I have no confidence that any offer made by either the plaintiff or the defendant, short of 100% vindication, would have resolved this case in advance of trial.

[16] The intent of **Rule 41A** is to induce settlements and avoid trials. There should be a departure from the *prima facie* operation of the rule only where the interests of justice clearly require it. *Bell Canada v. Olympia & North Developments Ltd.* (1994), 111 D.L.R. (4th) 589 (C.A.). Nonetheless the

application of **Rule 41A** is a discretionary matter and I exercise my discretion, in this case, against factoring it into my overall assessment of costs.

[17] **Civil Procedure Rule 63.02** addresses costs generally:

> 63.02.(1) Notwithstanding the provisions of rule 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
>
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E.62/9(4)]
>
> (c) direct whether or not any costs are to be set off.
>
> (2) The court in exercising its discretion as to costs may take into account,
>
> (a) any payment into court and the amount of the payment;
>
> (b) any offer of contribution.

[18] The discretion referred to in this rule includes the decision not to award costs in certain circumstances.

[19] In Orkin's The Law of Costs (2nd ed) the exercise of discretion is discussed at page 2-11:

> The discretion is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. The discretion is that of the trial judge and its exercise is not to be referred or delegated; nor can it be fettered by any consent of the parties, even though great weight should be given to such consent.
>
> The principles that should be observed in exercising discretion as to costs have been defined as follows:
>
> > First, the principle of indemnity is a paramount consideration. Secondly, the courts must approach the matter on the basis that encourages settlement of all actions from the outset. Thirdly, the court must discourage actions and defences which are frivolous. Fourthly, the court must discourage unnecessary steps in the litigation.
>
> The view has been expressed that costs should not be imposed as a matter of arbitrary or capricious practice by courts, but there should be a consistency of pattern.

[20] The author goes on to state that "a party's conduct both before and during the litigation process as well as the degrees of success achieved are relevant to the exercise of the courts discretion as to costs". I have concluded that both parties

conduct led to the need for this trial. I have also found that success was mixed and it would be impossible to conclude that one was more successful that the other.

[21] I exercise my discretion not to award costs and the parties will bear their own costs. This includes disbursements and pre judgment interest, something both parties had to endure. This was a case with high settlement prospects but the parties were not really open to this kind of resolution.

J.