SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Aurini v. Drake*, 2016 NSSC 126

Date: 2016-05-12
Docket: *Halifax* No. 1201-068663
Registry: Halifax

Between:

Mark Aurini

Petitioner

v.

Philomena Drake

Respondent

Judge:	The Honourable Justice D. Campbell
Heard:	Submissions filed by May 2, 2016 in Halifax, Nova Scotia
Written Release:	May 12, 2016
Counsel:	Yvonne LaHaye for the Petitioner Matthew Conrad for the Respondent

By the Court:

[1] This is an application for costs following the cancellation by one party of a scheduled Settlement Conference.

[2] **Facts:** There is no dispute that both parties to this divorce proceeding agreed to attend a Settlement Conference. There is no dispute that the plaintiff (husband) filed his Settlement Brief with the court. There is no dispute that the respondent (wife) filed her Settlement Brief. **Thereafter,** the wife canceled the Settlement Conference. There is no dispute that the husband's counsel was out of the country on the day when the cancellation occurred but learned of it a day or so later and days before the Settlement Conference was scheduled to occur. There is apparently no dispute that Settlement Conferences are a voluntary event to which and from which it follows that either party is at liberty to withdraw or attend.

[3] **The question:** The issue therefore is whether on the facts of this case the acknowledged cancellation of the settlement conference should result in costs being awarded to the opposite party. More to the point, whether the reason, in this case, for the cancellation affects that decision.

[4] **The arguments:** Counsel for the husband argues that her preparation for the settlement conference and the costs motion caused her to send a bill to her

client in excess of $6100 including disbursements and HST and that she should be reimbursed by a cost order for her full legal bill. She argues that the wife had committed to the settlement conference and cannot withdraw after preparation without facing a costs order which should be quantified by her actual legal bill.

[5] Counsel for the wife argues essentially 4 points:

[6] 1) He argues that the Civil Procedure Rules call for a cost order that is based on necessary costs and that the husband's lawyers' hourly rate of $385 is not a necessary rate because other lawyers charge less. He acknowledges that her seniority or reputation might justify such a rate but that since lower rates are available this cost is not a necessary cost;

[7] 2) He argues that a reasonable cost for preparation is about $1500;

[8] 3) He argues that there should be no full indemnity of those costs and that the reasonable contribution would be something lower than 100% of those reasonable costs and he measures that to be approximately $806.00

[9] 4) More fundamentally, he argues that the reason for canceling the Settlement Conference was that disclosure from the TD Bank came in after the Settlement Conference briefs were filed that showed in his or his client's judgement that the husband had committed a number of fraudulent transactions

against the wife and that this undermined her confidence in his disclosure and that accordingly the chance of settlement changed, after the filing of the briefs, from slim to nil.

[10] With respect, I disagree with 3 of those points.

[11] First, it is not appropriate for this court to pass judgment, without evidence, on the hourly rate charged by counsel for the husband.

[12] And, if the husband agreed to pay $385 per hour, as I must assume he did, I must accept that as being a reasonable and necessary cost to him. He should not be required to retain a lawyer with a lower hourly rate. I will not pass judgment on whether this particular senior counsel justifies her hourly rate based on efficiencies that her seniority creates or whether her advice, because of that seniority, is worth a rate higher than that which is charged by junior counsel or even other senior counsel. I must accept her hourly rate until I have evidence that it is inappropriate. Therefore, the argument that her legal bill is overstated by the rate per hour is rejected. Furthermore, I must accept her evidence of the hours she spent which, through the affidavit filed by her office manager, is said to be the case.

[13] Second I must therefore reject counsel's argument that $1500 is a reasonable cost on a solicitor client basis for the preparation for the settlement conference that was canceled.

[14] Third, I do agree that full indemnity is not appropriate. An order for costs is designed according to the Civil Procedure Rules to be a substantial contribution to the actual legal bill but not a full indemnity. I think that a 60% contribution is appropriate. I need not **necessarily** look to the Tarriff. Here, the court is being asked to consider the "throw away" factor.

[15] Fourth, I disagree that the reason for canceling the settlement conference justifies that act. I do not deny that counsel and the wife reached a conclusion that there had been a lack of appropriate disclosure but that fact is merely an allegation and one that is disputed by the husband. It is not yet substantiated. However, even if it is actually true (the conclusion that I do not reach without evidence), this would not change the prospect of settlement from slim to nil as suggested; instead it may have dramatically increased the wife's position on settlement. It might have caused her bargaining position to be stronger.

[16] The Settlement Conference would have been an opportunity to expose that allegation, an opportunity for the settlement conference Judge to listen to the

response and an opportunity for either the wife to capitalize on the allegation or for the husband to comment by way of denial of it.

[17] There is practically no such thing as no prospect of settlement. There is almost always a prospect of settlement. Why would a party not take the opportunity to hear from a Judge about the strength or weakness of their case even in the event of new evidence of new disclosure?

[18] The appropriate course of action for the wife on the facts of this case was to appear at the Settlement Conference and make her allegation about the fraudulent activities and deal in response with the explanations. If as a result of those explanations disclosure had become undermined she could then have walked away from the Settlement Conference with full indemnity as to costs. Instead, she chose to cancel it without giving it a chance to run its course which course might have resulted in settlement of some or all of the issues. She chose not to follow through with what she had agreed to do. She chose to abort any possibility of settlement. She chose to put the husband to a wasted cost of preparation and she must pay for her decision to do so.

[19] I order costs payable by the wife to the husband within 10 days hereof in the amount of $4000 inclusive of disbursements. This is roughly 60% of the legal bill

that I accept as not having been challenged successfully. This is a substantial contribution to the actual costs.

[20] In coming to this conclusion I have not ignored the fact that the wife's decision to abort the Settlement Conference has forced the parties to the cost of the trial. I have also not ignored the fact that some of the costs incurred by counsel in preparing for the Settlement conference will be of some use in preparation for the trial. Thus, full indemnity which amounts to solicitor and client costs is not , in my opinion, appropriate.

[21] I have taken into account the various remarks of Justice Williams in the case of Armoyen v Armoyen, (2015) NSCC 46.

[22] The Court must acknowledge that Settlement Conferences are held at great expense to the court's time and without any requirement in terms of each Judge's "job description". The Court must not promote a policy that would allow each litigant to cancel Settlement Conferences on a whim that settlement is unlikely. We must promote a policy that Settlement Conferences will be likely to be effective; otherwise we should not hold them.

Campbell, Douglas, J.