SUPREME COURT OF NOVA SCOTIA
Citation: Hill v. Cobequid Housing Authority, 2011 NSSC 219

Date: 20110606
Docket: Tru No. 259625
Registry: Truro

Between:

James Hill

Plaintiff

v.

Cobequid Housing Authority and
Nova Scotia Housing Development Corporation

Defendant

Judge:	The Honourable Justice David MacAdam.
Heard:	April 6, 2011, in Truro, Nova Scotia
Final Written Submissions:	April 11, 2011
Counsel:	Kerri-Ann Robson, for the plaintiff Darlene Wilcott, for the defendant

By the Court:

Introduction

[1] The plaintiff's claim for damages arising out of a slip and fall was dismissed after a two-day trial. The defendants seek party and party costs pursuant to Tariff A, based on an amount involved of $35,000.00 and applying Scale 2, with two days in court, for a total of $10,250.00. They also claim disbursements of $1298.56, for a total claim for costs and disbursements of $11,548.56. The defendants seek costs to be determined in accordance with the Tariff, while the plaintiff says that because of his financial circumstances the court should award a lump sum of zero.

[2] Prior to trial the defendants made a verbal offer to settle for $2000.00, which the plaintiff rejected. The plaintiff offered to settle for $88,651.22. Although the plaintiff's claim was dismissed, damages were provisionally assessed in the gross amount of $40,000.00, less $5000.00 on account of a failure to mitigate.

[3] In an affidavit filed on this application, the plaintiff says his income consists of a Canada Pension Plan payment of about $565.90 per month and Old Age Security of about $891.00 per month, for a total of approximately $1456.90 a

month. In his affidavit he states that he owns real property on which the 2010 municipal assessment was $47,700.00. He says there is an outstanding mortgage on this property with monthly payments of $576.00. He also has a line of credit of a little less than $5000.00, on which he pays approximately $300.00 per month. At trial he acknowledged that he makes approximately $5000.00 per year cutting and selling wood and that he performs handyman services, for which he apparently obtains an indeterminate amount of money or payment by barter.

The Relevant Civil Procedure Rules

[4] The general principles of costs are set out at Rules 77.02 and 77.03:

> 77.02 - General discretion (party and party costs)
>
> (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> 77.03 - Liability for costs

(1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

....

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise....

[5] The principles governing tariffs and lump sums are set out at Rules 77.06-77.08:

77.06 - Assessment of costs under tariff at end of proceeding

(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

77.07 - Increasing or decreasing tariff amount

(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted....
>
> ....
>
> (e) conduct of a party affecting the speed or expense of the proceeding....
>
> 77.08 - Lump sum amount instead of tariff.
>
> A judge may award lump sum costs instead of tariff costs.

[6] Rule 77.04 contemplates that a party can be relieved from liability for costs on account of poverty:

> 77.04 - Relief from liability because of poverty
>
> (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> ....

> (b) a claim made by the party is defended or contested....

[7] The transition to the 2009 *Civil Procedure Rules* is addressed in Rule 92:

> 92.02 - Application to outstanding proceedings
>
> (1) Unless this Rule provides or a judge orders otherwise these Rules apply to all steps taken after the following dates in the following kinds of proceedings:
>
> ....
>
> (b) January 1, 2009 in an action started before that day.
>
> (2) The Nova Scotia *Civil Procedure Rules (1972)* apply to all other proceedings started before January 1, 2009, unless a judge orders otherwise.

[8] This proceeding was commenced before the effective date of the 2009 Rules. The 2009 Rules apply to all steps taken since January 1, 2009 and therefore apply to the trial of this matter and the determination of costs as well.

Law and Argument

[9] The defendants submit that in determining costs, only the factors outlined in Rule 77.07(2)(a) and (b) are relevant. The offer made by the defendants was made verbally and apparently shortly before trial. Rule 77.07(b) would not appear to be applicable.

[10] In respect to determining the "amount involved", for purposes of applying Tariff A, the plaintiff submits that the court should use the amount of damages provisionally assessed, which was $35,000.00. Under Scale 1, costs for damages between $25,000.00 and $40,000.00 would be $4,688.00. Adding one-and-a-half days of trial, at $2,000.00 per day pursuant to Tariff A, would add $3,000.00. The defendants argue for the use of Scale 2 on the amount of damages provisionally assessed, giving total costs of $10,250.00, to which would be added disbursements, for a total of costs and disbursements of $11,548.56.

[11] Although counsel's suggestion of using the amount provisionally assessed as the "amount involved" is reasonable, considering that the plaintiff's offer to settle was in the amount of $88,651.22, Scale 2 would appear to be excessive. Although there was medical evidence, it is clear that this was a trial without significant legal issues or, for that matter, complicated factual issues. It is difficult to imagine a

more straightforward trial. If Scale 1 is not applicable here, it is difficult to envisage a situation where it would be. The authorities referenced by the defendants involved both more lengthy and more complex trials. I am satisfied, if applying the Tariff, the appropriate scale would be Scale 1.

Relief from Costs because of Poverty

[12] The plaintiff says he should be relieved from liability for costs because of his financial circumstances. He calls for a lump sum award of zero dollars.

[13] The defendants say Rule 77.04, providing relief from liability for poverty, is not applicable, since no application was made in accordance with subsection (2). However, this Rule did not exist when the Plaintiff commenced the proceeding in 2005. Whether the plaintiff could have applied for relief upon the rule coming into effect is not a matter for determination at this time.

[14] The defendants rely on *Farrell v. Casavant*, 2010 NSSC 46, where the plaintiff argued that because of his modest means the court should deny the successful defendant costs. Smith A.C.J. acknowledged, at para. 25, that there have

been occasions, predominantly in family law cases, where the court has considered a party's financial circumstances in dealing with costs, but added that this is a factor not usually taken into account by the court. The Associate Chief Justice determined that the plaintiff's financial circumstances should not affect her costs award.

[15] The Defendant also relies on *Marsh v. Paquette*, 2011 NSSC 70, where the defendants were awarded costs after a 19-day trial in which the plaintiff received damages of less than ten per cent of her claim. Hood J. said:

> [33] The plaintiff says it would be a hardship if she were required to pay costs. That is no doubt true of many parties. However, this plaintiff has an income from WCB and, unlike the plaintiff in *Windsor* does have a major asset: she is joint owner of a home in a newer subdivision in a good neighbourhood. The family is not impecunious; her husband has a good job and they are in their 50's.
>
> [34] The second reason for declining to award no costs to the defendants is the overall purpose of a costs award. As Saunders, J. (as he then was) said in the oft-cited case of *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (S.C.) in para. 17:
>
> > [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement

> is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[16] The plaintiff cites *Windsor v. Poku*, 2003 NSSC 95, which Smith A.C.J. had noted in *Farrell v. Casavant, supra,* as an example of a circumstance where the court has taken account of the financial circumstances of an unsuccessful party when awarding costs in a non-family case. Hood J. also distinguished *Windsor* in *Marsh*, reasoning that the plaintiff in that case was living on a fixed income with no major assets and was ordered to pay costs and disbursements totalling $10,000.00, which was substantially less than the amount calculated pursuant to the tariff. At paras. 13-20 in *Windsor*, MacLellan J noted *Gilfoy et al v. Kelloway* (2000), 184 N.S.R. (2d) 226. In that case, Goodfellow J. said, at para. 25:

> More importantly, the determination of costs with the rare exception of some exceptional family law situations has never been influenced by wealth, lack of wealth or impecuniosity of a party. The Registry of Deeds contains many judgments for and including costs and the collectability of costs is not a factor to be considered in the proper exercise of judicial discretion as to *entitlement to costs or indeed the quantum of costs*.... [Emphasis in original.]

[17] This passage was cited by the Associate Chief Justice in *Farrell*, stating that financial circumstances of an unsuccessful party, with the exception of a few non-family law cases, were not to be taken into account when awarding costs.

[18] MacLellan J. noted in *Windsor* that Goodfellow J.'s decision in *Gilfoy* had not considered *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173, 1984 CarswellNS 47 (S.C.A.D.), a decision dealing with costs in a divorce and corollary relief proceeding. MacDonald J.A. stated, at paras. 8 and 10-11:

> I believe the law is clear that, if the awarding of costs would create an undue financial hardship, it would be a proper exercise of the judicial discretion to refuse to grant them. : see *Sidmay Ltd. v. Wehttam Invt. Ltd.*, [1966] 1 O.R. 457, 54 D.L.R. (2d) 194, reversed in part [1967] 1 O.R. 508, 61 D.L.R. (2d) 358, which was affirmed [1968] S.C.R. 828, 69 D.L.R. (2d) 336.
>
> ....
>
> As Hallett J. pointed out in *Bennett v. Bennett* (1981), 23 R.F.L. (2d) 302, 45 N.S.R. (2d) 683, 86 A.P.R. 683 (T.D.), there must be a good reason not to award costs to a successful party in a matrimonial cause. I would but add such reason must be based on principle. Here Richard J. obviously felt that the additional hardship of costs was a burden the respondent under the circumstances should not be called upon to bear.
>
> In our opinion, this decision can be interpreted as denying costs on the ground of the respondent's impecuniosity. The trial judge made his decision after seeing and hearing both parties and other witnesses and we are not convinced that he erred in the exercise of his discretion.

[19] While *Kaye* was a family law case, *Sidmay Ltd. v. Wehttam Invt. Ltd., supra*, which was cited by Macdonald J.A., was not. In that case Grant J. of the Ontario High Court of Justice, at para. 40, in concluding his reasons, stated:

> I do not allow the plaintiff costs of this action for the sole reason that as a result of this judgment the defendant will be unable to recover from the plaintiff a very substantial sum of money which they are entitled to retain. To ask the defendant to pay costs as well would create an unjust hardship.

[20] The Ontario Court of Appeal reversed the decision of Grant J., and commented that the appellant "should have the costs of the action," but did not comment on the merits of the reasoning of Grant J.: 61 D.L.R. (2d) 358, 1967 CarswellOnt 235, at para. 60. The Supreme Court of Canada, affirming the Court of Appeal decision, observed at para 10, that Justice Grant had made no order as to costs: [1968] S.C.R. 828, 1968 CarswellOnt 84. No adverse comment was made concerning Grant J.'s conclusion.

[21] There have been other recent decision in which the courts of Nova Scotia have taken account of financial considerations in determining whether to order costs, or in determining the quantum of costs. In *Gillan v, Mount Saint Vincent University*, 2007 NSSC 249, LeBlanc J., referred to *Kaye v. Campbell, supra*, and *Windsor v. Poku, supra*, and added that Warner J. had made similar comments in *Lockhart v. New Minas* (Village), 2005 NSSC 93. In that case, Warner J. said, at para. 45:

> A fairness concern is the inability of the average Canadian to access the civil justice system because of its complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by proponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant, for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool.

[22] In *Gillan*, LeBlanc J. estimated costs, as between solicitor and client, at between $30,000.00, and $40,000.00, and awarded party and party costs of $5,500.00, an amount which, he said, "would provide a substantial contribution to the overall cost of the proceedings, and would be reasonable in the circumstances. I am also satisfied that it would reflect Ms. Gillan's financial circumstances" (para. 9). He concluded that "a lump sum award of costs is appropriate here, rather than awarding costs based on the tariff and augmenting it with a lump sum" (para. 11). He concluded, "I am mindful that Ms. Gillan may not have the financial ability to pay a substantial costs order; nevertheless, I am satisfied that the defendant should not be denied its costs in the circumstances" (para. 12).

Status of Crown counsel

[23] The defendants submit that whether a lawyer is a salaried employee of the Crown is not a factor in determining a costs award. They argue that the common law rule to this effect has been "practically abolished." Subsection 16(1) of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, provides that "[s]ubject to this Act, in proceedings against the Crown the court may make any order, including an order as to costs, that it may make in proceedings between persons, and may otherwise give the relief that the case requires." The defendants cite *Bent v. Nova Scotia Farm Loan Board, Horsnell and Horsnell* (1978), 30 N.S.R. (2d) 552, [1978] N.S.J. No. 689 (S.C.A.D.), where the court said, "[t]his proceeding was brought against the Board under the *Proceedings Against the Crown Act* which entitles the Crown to claim costs, and the courts have held over the years that in basically civil proceedings of this sort the Crown should be treated like any ordinary litigant with regard to costs" (para. 19).

[24] Similarly, in *Turner-Lienaux v. Nova Scotia (Attorney General)*(1992), 115 N.S.R. (2d) 200 (at 211), 1992 CarswellNS 692 (S.C.T.D.), affirmed at 122 N.S.R. (2d) 119, 1993 CarswellNS 229, Roscoe J. (as she then was) said, at paras. 25-27:

> The plaintiff submits that the court should exercise its discretion and not award costs to the defendants because "the Crown is a public body". The plaintiff relies

> on *Downtown Oshawa Property Owners Association, et al v. The City of Oshawa, et al* (1978), 22 N.R. 152, a case in which the Supreme Court of Canada when dealing with the *Assessment Act* of Ontario declined to order a group of representative property owners to pay the costs of the municipality and the assessment commissioner.
>
> It is entirely within the court's discretion whether to award costs for or against the Crown by virtue of s. 16(1) of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360 and Civil Procedure Rule 63.02(1).
>
> In *Bent v. Nova Scotia Farm Loan Board, et al* (1978), 30 N.S.R. (2d) 552 (A.D.), the court held that there would have to be special circumstances to disentitle the successful Crown agency from the recovery of its costs in a civil action. I agree with the reasoning of that case and am unable to find that there are any special circumstances in this case, such as existed in the City of Oshawa case, that would disentitle the defendants from their costs.

[25] The defendants also point to the comment by the *Federal Court of Appeal in Canada (Attorney General) v. Georgian College of Applied Arts & Technology*, 2003 FCA 199, 2003 CarswellNat 1423, that "the fact that HRDC was represented by salaried employees ... is not a relevant consideration" in determining costs" (para. 31).

[26] There is no doubt that the court's discretion as to costs extends to awarding costs in favour of the Crown, where counsel is a Crown employee.

Conclusion

[27] The defendants say the plaintiff is not impecunious. He has assets, including a motor vehicle and a home. In addition to his monthly income of approximately $1450.00, he has self-employment earnings of about $5000.00 per year, as well as income from handyman work.

[28] Rule 77.06(1) provides a discretion for awarding party and party costs. Rule 77.07(1) permits the trial judge to add or subtract amounts from the tariff costs. Rule 77.07(2)(e) provides that the court may consider "conduct of a party affecting the speed or expense of the proceeding." Counsel notes that the case was heard in under two days, there was substantial agreement on expert's qualifications and medical documentation was filed by consent. She suggests that the conduct would make scale one most applicable in determining costs. Counsel's calculation is that using Scale 1, and the provisionally assessed damages of $35,000.00, the amount would be $4688.00, and that the trial being for one and half days the add-on would be $3000.00, for a total of $7688.00.

[29] The successful defendant is entitled to costs. However, unlike the unsuccessful party in *Marsh v. Paquette, supra*, the plaintiff does not have the

income, nor apparently the assets of the unsuccessful, or minimally successful plaintiff, considered by Justice Hood. Like the plaintiff in *Windsor v. Poku, supra*, he lives primarily on a fixed income. Hood J. concluded that the family was not impecunious and declined to accept the submission that no costs be awarded against her. She distinguished *Windsor v. Poku, supra,* on the basis of the financial position of the plaintiff.

[30] In *Farrell v. Casavant, supra*, the Associate Chief Justice, in rejecting the request to award no costs to the defendants, awarded the defendants only 25% of their costs and disbursements because one of the primary issues at the trial was the interpretation and application of new legislation which she found to be of "significant public importance." Also, there had been two formal offers made by the defendants, and not accepted by the plaintiffs.

[31] Like LeBlanc J. in *Gillan*, I am satisfied that the appropriate approach to awarding costs in this instance is by way of lump sum rather than by applying the tariff and adding a lump sum. Financial considerations are not listed as one of the factors to be considered in Rule 77.07(2), but I am satisfied it is a factor that can be taken into account. The defendants have calculated party and party costs, on Scale

2, at $11,548.56. Considering their entitlement to some costs, the financial circumstances of the plaintiff, the fact that although the plaintiff was unsuccessful, this was not a frivolous proceeding, I conclude that a fair award of costs and disbursements in this proceeding is a lump sum of $4000.00.

[32] Judgment accordingly.

A. David MacAdam, J.