SUPREME COURT OF NOVA SCOTIA
Citation: Leigh v. Belfast Mini-Mills Ltd., 2011 NSSC 320

Date: 20110816
Docket: Hfx 272748
Registry: Halifax

Between:

Gillian Leigh, Wanda Cummings and Toltec Holdings Incorporated, carrying on business as Mabou Ridge Centre for Holistic Living

Plaintiffs

v.

Belfast Mini-MillsLtd. and International Spinners Ltd.

Defendants

Decision on Costs

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	November 22 and 23, 2010
Final Written Submissions:	August 11, 2011
Counsel:	Gillian Leigh and Wanda Cummings, self represented, and on behalf of all Plaintiffs
	Robert K. Dickson, Q.C. for the Defendants

By the Court:

INTRODUCTION

[1] As the parties are unable to agree, I must decide the costs payable arising from my decisions reported as *Leigh v. Belfast Mini-Mills* 2011 NSSC 300 and *Leigh v. Belfast Mini-Mills* 2011 NSSC 303.

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[2] In the first of these matters (the first motions), the plaintiffs moved:

1. For summary judgment on the pleadings;
2. For summary judgment on evidence;
3. For a finding that the defendants committed an abuse of process;
4. To convert the action to an application;
5. To require the defendants to produce documents;
6. To require the defendants to comply with undertakings.

[3] They were unsuccessful in all of these motions.

[4] In the same proceeding the defendants moved:

1. For an order to require the defendant Gillian Leigh to return to complete discovery examination of her;

2. For an order to require that the defendant Gillian Leigh answer certain questions in discovery that she previously refused to answer;

3. For an order requiring the plaintiffs to produce documents.

[5] Incidental to the two sets of motions was the determination of whether Ms. Cummings would also be required to attend for discovery examination and if so, whether she could be asked the same questions that Ms. Leigh had earlier refused to answer.

[6] The defendants were successful in their first two motions and substantially successful in the third motion. As well, Ms. Cummings was directed to submit to discovery questioning on the same issues as Ms. Leigh.

[7] The plaintiffs' motions were supported by seven affidavits (two were filed as a single joint affidavit) and extensive documentary evidence. The defendants relied on three affidavits (two were solicitor's affidavits) with supporting documents.

[8] Two days of court hearings were held. The first was spent in preliminary motions relating to the admissibility of filed affidavits and documents. The second was largely committed to the plaintiffs' oral submissions. The parties agreed to complete their final submissions in writing, which they did, again with fairly extensive submissions from the plaintiffs, in particular.

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[9] Immediately following the delivery of the first decision to the parties the plaintiffs filed a motion by correspondence seeking an order to prohibit the publication of the decision. The defendants responded in a written submission and the plaintiffs replied. I issued a decision refusing the plaintiffs' motion.

Further proceedings

[10] The plaintiffs made a further motion by correspondence seeking that I re-consider the decision to refuse a ban on publication of the decision as to the first set of motions. I denied the motion.

[11] The plaintiffs then sought to make a further motion by correspondence seeking that I enter a "stay" of the three decisions - the first motions; the refusal of the publication ban; and the refusal of the request to reconsider. I refused to entertain this further attempted motion. All motion documents were sent to the defendants who did not make submissions after the first request for a publication ban.

[12] I invited the parties to attempt to reach an agreement as to costs but they have been unable to do so. I am in receipt of their written submissions on this question.

[13] The defendants seek $3,500 costs on the first motions in addition to $272.53 in disbursements. They seek a further $200 costs in relation to the plaintiffs' motion to ban publication of the first decision. The defendants argue that costs in both cases should be payable forthwith.

[14] The plaintiffs' position is that they are entitled to costs, or in the alternative that the decision as to costs should be reserved pending disposition of their appeal of the decisions.

ANALYSIS

[15] The court has a general discretion with respect to the payment of costs and may make any order that satisfies the court that the order will do justice as between the parties. *See,* **Nova Scotia Civil Procedure Rule 77.02.**

[16] The court has a number of options available to it in exercising this general discretion. **Rules 77.03(1) and (2)** provide that the court may make an order directing the parties to bear their own costs, pay costs to another on a party and party basis or on a solicitor and client basis.

[17] **Rule 77.03(3)** provides that:

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

[18] As the defendants have been successful throughout they are entitled to costs which I conclude will be payable on a party and party basis in accordance with **Tariff C.** *See*, **Rule 77.06 (1) and (3):**

> 77.06 (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.
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> ...
>
> (3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with **Tariff C.**

[19] **TARIFF C** provides that:

> Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia
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> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers

(2) **Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A**.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application. (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction)

Length of Hearing of Application Range of Costs

...

1 day or more $2000 per full day

(Emphasis added)

[20] Application of the Tariff would support a costs award of $4,000 for this two day hearing which did not determine the entire proceeding. Having regard to the extent of the work involved in these various matters the defendants' request for costs of $3,500 on the first motions, and $200 on the motion for non publication is reasonable and in the range of costs contemplated by the Tariff.

[21] The plaintiffs filed a 22 page, 61 paragraph submission in support of their position on costs. They build their argument on an incorrect legal premise. They refer me to **Rule 77.13** that sets out the factors to consider in determining the entitlement and assessment of legal counsel's fees and disbursements. That provision has no application to the issues of costs in this case.

[22] Much of the plaintiffs' submission is a re-statement of arguments I have rejected in the two published decisions. At one point they suggest that I "re-open the matter" under **Rule 82.22.** The plaintiffs re-argue my findings and conclusions and make a not too subtle inference that it would be appropriate for me to reserve decision on costs while the appeal court corrects any errors I may have made.

[23] I cannot accept this approach. The remedy for the plaintiffs is to appeal the decisions, as they apparently are intending, and if they are dissatisfied with this decision as to costs, then they can refer it to the Court of Appeal as well, where both the decision and the costs can be decided in the manner determined by that court.

[24] Substantial parts of their submission are assaults on the integrity of counsel for the defendants. The plaintiffs raise the same allegations that they advanced in support of the failed motion for an abuse of process. They continue to insist that the defendants accessed “sealed” and “confidential” documents; that counsel breached the implied undertaking rule; that defendants’ counsel have not been “forthright”, having committed “perjury” and actively misrepresented information to the court. They suggest the motive is to cause “harm and delay” and to “crush” the plaintiffs into submission. The ongoing personalized attacks on counsel for the defendants are unwarranted and reprehensible.

[25] I find no merit in the submissions of the plaintiffs and order costs payable by them to the defendants in the total amount of $3,700, being comprised of $3,500 in relation to the first motions and $200 for the non publication motion.

[26] I am also satisfied that the defendants are entitled to their necessary and reasonable disbursements which I set at $272.53. *See*, **Rule 77.10**.

[27] The plaintiffs will pay to the defendants total costs and disbursements of $3,972.53.

Should the costs be made payable forthwith?

[28] The remaining issue is whether the costs should be made payable forthwith, as requested by the defendants.

[29] Paragraph (2) of **Tariff C** makes costs presumptively payable "in the cause", however the court has the discretion to order costs payable forthwith. **Rule 77. 03(4)**:

> (4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
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> > (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;

> (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
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> (c) **to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;**
>
> (d) **any other way the judge sees fit.**
>
> (Emphasis added)

[30] The plaintiffs had legal counsel who prepared the Notice of Action and participated in discoveries of the defendants' witnesses and the aborted discovery of Ms. Leigh. After that, the plaintiffs dismissed their counsel over what Ms. Cummings described as "disagreements with [their] counsel over several issues". This suggests a breakdown in the confidence that is necessary as between a solicitor and their client.

[31] Regrettably, the history of this matter since that decision shows the self represented plaintiffs to have undertaken a series of ill advised and poorly framed motions, applications and appeals, each involving the defendants directly or

indirectly; each generating costs and delay. The plaintiffs have resisted reasonable attempts by the defendants to gain their compliance with discovery and production obligations. The plaintiffs' lack of understanding of procedural and substantive law does not excuse them from responsibility for the cost consequences of their actions.

[32] The plaintiffs' multiple motions presented to me were almost entirely without merit and were predictably so.

[33] Their resistance to the defendants' motions to participate in discovery and to make document production were understandable - they saw it as a matter privacy interests being unreasonably pried into for irrelevant purposes - but again was largely without merit.

[34] A review of the public record shows the following matters before the courts in the past months:

- *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 23 (January 25, 2011): The issue before the court was whether to award costs to the defendants when the plaintiffs sought and obtained an adjournment of

a 2 day application in Chambers, three days prior to the hearing. The application was among the questions ultimately decided by me in the first motions. Leblanc J. assessed costs of $1,000 payable by the plaintiffs to the defendants "in any event of the cause and at the end of the proceedings".

- *Cummings and Leigh v. Nova Scotia (Community Services)Minister of Community Services, Capital District Health Authority, Department of Justice, Royal Canadian Mounted Police, Nova Scotia Department of Community Services* (Various court file numbers, May 2010): An unreported decision of Robertson J. of the Nova Scotia Supreme Court refusing the plaintiffs' application to seal information that the defendants accessed in a public record;

- *Cummings v. Nova Scotia (Community Services)* 2011 NSCA 2 (January 6, 2011): the Court of Appeal refused an application to extend time to appeal Justice Robertson's decision. No costs were sought or ordered;

- *Cummings v. Belfast Mini-Mills Ltd.* 2010 NSSC 459 (November 9, 2010): Coughlan J. denied the plaintiffs' motion for an injunction to prohibit the defendants from using information from the public files in other court proceedings, such as the matter before me. The plaintiffs were ordered to pay costs of $1,000 in any event of the cause.

- *Cummings v. Belfast Mini-Mills Ltd.* 2011 NSCA 56 (June 9, 2011): The Appeal Court dismissed the plaintiffs' appeal against the decision of Justice Coughlan. Costs were refused to both parties. The court observed that:

> [46] ... The appellants are self-represented, and it appears, from my review of the record that this appeal results from their misunderstanding of the effect of the provisions of the FOIPOP Act and the directions conferred by the Practice Memorandum and others.

- *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38 (February 1, 2011): an unsuccessful appeal filed by Ms. Cummings under the **Freedom of Information and Protection of Privacy Act** S.N.S. 1993, c. 5 to obtain certain records and to expunge others from the Public Prosecution Services file.

[35] The plaintiffs advised in their post decision submissions seeking a non publication order that they are intending an appeal to the Supreme Court of Canada against the decision of the Nova Scotia Court of Appeal of what I assume to be the decision reported at 2011 NSCA 56. They also advised that they would feel obliged to appeal my decision to the Nova Scotia Court of Appeal if I did not grant a non publication order. Both of these actions are open to them to take at law, whether or not they have a hope of success.

[36] Having said that it is relevant to my decision that despite repeated failures in the courts, and orders of costs made against them, the plaintiffs show no restraint in pursuing arguments that generate cost and delay and that have little or no legal support. As they pursue their legal journey, they continue to make unwarranted personal attacks on defendants' counsel asserting ethical and legal misconduct.

[37] The defendants have characterized the first motions as a "colossal waste of time of the Court and of the Defendants and their counsel" that, in the circumstances calls out for an immediate payment of costs. Citing *National Bank Financial Ltd. v. Potter* 2008 NSSC 213 at paras 12 - 14 they submit that the motions were largely procedural in nature which lends support to this outcome.

[38] They also argue that it is probable that the "defendants will continue to obstruct the process of the action" if there is not some immediate deterrent to proceedings they feel are frivolous and vexatious.

[39] I have been referred to the decision in *Salvage Association v. North American Trust Company* 1998 NSCA 210. In that case, the court upheld the decision of Davison J. to order costs payable forthwith following a decision that

certain persons for the respondents were required to attend for discovery examination. The court accepted Justice Davison's assessment that the application to require attendance for discovery should not have been necessary and that making costs payable forthwith was a way to express disapproval for the parties' resistance to discovery.

[40] The court also considered circumstances such as undue financial burden upon the payor of costs that would mitigate against a requirement to pay forthwith. It cited with approval the decision of Martin J. writing in *Ford v. Canadian National Railway* (1937) S.J. 31 (Sask. C. A.) where after noting the "usual rule" of costs is to make them payable in any event of the cause he says:

> 1 ...The rule is usually applied to interlocutory proceedings although exceptional cases sometimes arise when the Courts will make the costs of proceedings payable forthwith or payable before a party is allowed to proceed: *Nicholson v. Coulson* (1873) 6 P.R. 65; *Cocker v. Tempest* (1841) 7 M. & W. 502, at 503, 10 L.J. Ex. 195, 151 E.R. 864. No reasons appear in the present case why the rule should be departed from. **The object of the Courts in adopting the rule is to have one taxation of costs in an action and no doubt also to avoid making an order as to costs which might prevent someone who may have a just claim from pursuing it because he may be unable to pay the costs of some interlocutory proceeding....**
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> (Emphasis added)

[41] There is information that was adduced in the motions which suggests that the plaintiffs have limited financial means and I am mindful that an order made payable forthwith could be a burden. However I accept the arguments advanced by the defendants. They have been put to considerable expense to respond to the plaintiffs' unnecessary motions; and to obtain the plaintiffs' compliance with the Rules. The plaintiffs need to better appreciate that there is a cost associated with their pursuit of ill advised legal proceedings, irrespective of their belief in the correctness of their position.

[42] The result will balance the objectives of a forthwith payment, with the financial limitations of the plaintiffs. Therefore I conclude that the plaintiffs must pay the disbursements of $272.53 together with costs of $700.00 for a total of $972.53 forthwith. The balance of $3,000.00 must be paid on or before January 31, 2012.

J.