SUPREME COURT OF NOVA SCOTIA
Citation: *Musgrave v. Ford*, 2016 NSSC 258

Date: 2016-09-27
Docket: Hfx No. 339161
Registry: Halifax

Between:

Cecil Musgrave

Plaintiff

v.

Ferguson Ford

Respondent

DECISION ON COSTS

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 9, 10, 15, 16 and 18, 2016, in Halifax, Nova Scotia
Final Written Submissions:	July 21, 2016
Counsel:	Jeremy Gay, for the Plaintiff Stephen Kingston and Ian Dunbar, for the Respondent

By the Court:

Introduction

[1] This is a decision on pre-judgment interest and costs. The original decision is reported at 2016 NSSC 157. The plaintiff retained the defendant, a lawyer, to prepare mortgage documents and to give advice on certain investments, specifically, short-term second mortgages. It transpired that the borrower on the mortgage that was negotiated had existing debts related to real property taxes and outstanding judgments. The guarantor, the borrower's spouse, had declared bankruptcy. The plaintiff made a further loan to the borrower, who fell into arrears on both loans. The property was foreclosed upon, and the plaintiff lost the investment. The defendant admitted that he failed to advise the plaintiff about the outstanding property tax and judgments against the borrower, and thereby breached his standard of care. I concluded that the plaintiff would not have advanced the first loan if he had known about outstanding taxes and judgments, and that he would not have advanced the second loan had he known about a tax judgment that would take priority over it. The plaintiff was awarded damages of $77,535 (being the $90,000 invested, minus the interest the plaintiff received from the borrower) on account of the loan advances, and $12,753.78 on account of legal expenses incurred in trying to recover on the loans.

Pre-judgment interest

[2] In the main decision I awarded pre-judgment interest at a rate of five percent (para. 72). I did not specify the sum on which interest would be applied, or the time period for which interest would be credited. The plaintiff submits that interest should be calculated on the entire loan, that being $90,000 (not deducting the interest received from the borrower), rather than the amount of damages actually awarded. In my view, the plaintiff should not recover interest on interest. Accordingly, the plaintiff shall have interest at five percent on the net amount of $77,535 (as well as on damages under other headings).

[3] Pre-judgment interest is due “for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal”: *Judicature Act*, R.S.N.S. 1989, c. 240, s. 41(i). This requires a determination of when the cause of action arose. The plaintiff says interest should be calculated from the dates the loans were advanced. The defendant argues that interest should

run from the dates the loans fell into arrears. The first loan, $40,000, was advanced on March 15, 2006, and the second on September 4 of the same year. Both loans were advanced on an interest-only basis until their due dates. The borrowers stopped making interest payments in April 2007.

[4] The plaintiff argues that the cause of action arose in 2006, when the defendant failed to search title and notify him of the borrower's outstanding taxes and judgments before he advanced the loans. In my view, the defendant's negligence occurred in 2006. However, the loss did not materialize until 2007, when the loans fell into default. The plaintiff should not recover on the basis of the breach of the standard of care alone; there must also be a loss. The loss in this case arose when the borrower stopped paying interest on the loans, the failed to pay back the principal. Had the borrower not gone into default, the plaintiff would not have had a cause of action on the basis of the breach of the standard of care alone.

[5] Plaintiff's counsel has outlined the history of the litigation. He says the plaintiff began considering his enforcement options around April 2007, and subsequently had a demand letter sent, before commencing legal action in August 2007. TD Bank commenced foreclosure proceedings on April 29, 2008, and purchased the property at the foreclosure sale on July 7, 2009. As a result, the plaintiff's security was effectively wiped out.

[6] After the sale, the plaintiff sought legal advice on a potential claim against the defendant later in 2009 and in 2010. On September 29, 2010, his counsel made a formal demand on the defendant, and this proceeding was commenced on November 16, 2010. The defendant filed a defence on December 21, 2010. Documents were exchanged between June and October 2011, followed by dealing with a demand for particulars in the early months of 2012. There were discoveries in July and August 2012, and responses to undertakings in December 2012 and March 2013. Plaintiff's counsel was effectively unavailable through 2013 for medical reasons.

[7] Plaintiff's counsel then filed interrogatories in February 2014, which were answered in April. Between May 2014 and March 2015, plaintiff's counsel was occupied with obtaining an expert opinion report. Although the expert was retained in November 2014, the nine-page report was not received until March 31, 2015. A settlement conference occurred in September 2015, without resolving the matter. On September 30, 2015, the defendant delivered a formal offer to settle, which the

plaintiff rejected. The parties proceeded to a date assignment conference and trial readiness conference in November 2015.

[8] The defendant points out that it took nearly nine years for the claim to reach trial after April 2007. He argues that the matter was relatively straightforward and this was an unreasonable length of time to get it to trial. The plaintiff commenced the action in November 2010, but discoveries were not conducted until the summer of 2012, and the matters was not set down for trial until November 2014. Consequently, the defendant's position is that the time period for pre-judgment interest should be reduced by three years, on account of delay for which the plaintiff should bear responsibility.

[9] As for the calculation of pre-judgment interest, the relevant amounts are $77,535 (the loans) and $12,753 (legal costs). I conclude that interest should attach to the loan portion for 2635 days at $10.52 per day, for a total of $27,720.20. Interest shall attach to the legal cost portion of the damages for 2178 days at a rate of $1.74 per day, totaling $3789.72. I have reduced the time because the unfortunate medical issues encountered by plaintiff's counsel should not impose a further burden on the defendant. Further, I am satisfied that there was a significant delay from the date of the loss to the initiation of the claim. I am satisfied that a two-year deduction is appropriate on that basis.

Costs

[10] Party-and-party costs are governed by Civil Procedure Rule 77. A judge may "at any time, make any order about costs as the judge is satisfied will do justice between the parties": Rule 77.02(1). In most circumstances the judge has a "general discretion … to make any order about costs": Rule 77.02(2). That being said, the general rule is that "[c]osts of a proceeding follow the result, unless a judge orders or a Rule provides otherwise": Rule 77.03(3). Party-and-party costs will usually be fixed in accordance with the tariffs of costs and fees: Rule 77.06(1). However, in appropriate circumstances the court has the discretion to "add an amount to, or subtract an amount from, tariff costs" or to "award lump sum costs instead of tariff costs": Rules 77.07(1) and 77.08, respectively.

[11] The parties agree that Tariff A applies. The defendant says it was not a complicated proceeding, and that Scale 2 is appropriate. The plaintiff submits that I should apply Scale 3, due to the need for expert evidence and counsel's preparation of two volumes of joint exhibits. I am not convinced that there is a reason to depart

from the basic scale to the elevated scale. The issues were not complex; with respect to the expert evidence, neither the instructions to the expert nor the comprehension of the report was complex or difficult. I do not believe this proceeding reached the level of complexity that would require moving to Scale 3: see, for instance, *Hayward v. Young*, 2012 NSSC 56, [2012] N.S.J. No. 62, at para. 21, varied on other grounds, 2013 NSCA 65.

[12] The amount involved is the total damages, $90,288. I do not agree with the plaintiff's suggestion that pre-judgment interest should be included in determining costs: see *Canadian Geotechnical Construction Ltd. v. Meridian Management Ltd.* (1995), 142 N.S.R. (2d) 70, [1995] N.S.J. No. 168 (S.C.), at para. 17.

[13] The trial was heard over three full days and two partial days – which I am satisfied should count as full days in the circumstances – for a total of five days. Thus, there will be an additional $2000 per day of trial in accordance with the tariff. The result is a Tariff calculation of $12,250 under Scale 2, plus $10,000 for the daily amounts, for total costs of $22,250.

[14] Plaintiff's counsel says the amount of costs due on this amount involved under the basic scale of Tariff A is not sufficient, in view of the total fees and expenses incurred by his client, which totaled about $46,750. As an alternative to including pre-judgment interest in the amount involved, he requests a lump sum costs order instead of tariff costs in the range of $29,000, pursuant to Rule 77.08.

[15] With reference to plaintiff's counsel's fees between October 2009 and November 2014, counsel has provided evidence describing the work performed, but not of the time allocation to the specific items, only general summaries of the numbers of hours worked. An itemized accounting only appears for the period between May 28 and December 18, 2015. It is therefore impossible to draw a reliable conclusion as to whether the hours were reasonable in view of the actual work done. That being said, I am satisfied that the matter was of sufficient scale and complexity that $19,000 does not represent "a real and substantial contribution to the cost of litigation while ensuring that access to the Courts is not denied by putting the cost of litigation beyond the reach of the perspective losers": *Dalhousie University v. Aylward*, 2001 NSSC 51, [2001] N.S.J. No. 129, at para 14.

[16] I believe that a real and substantial contribution to party and party costs in this case should not result in costs of less than fifty percent of the fees incurred. I note that the defendant does not appear to take exception to the reasonableness of

the fees. As such, I conclude that a lump sum of $23,500 is an appropriate measure of party-and-party costs in this case.

Disbursements

[17] As for disbursements, plaintiff's counsel has claimed photocopy costs of $1295, with some copies charged at a rate of .25 per copy, and others at .45. (The claim is for half the amount actually invoiced.) It is not clear what the reason was for the different rate. I agree with the comments of Hood J in *Landry v. Kidlark*, 2014 NSSC 432, [2014] N.S.J. No. 641, at para. 81, that rates at this level are excessive. I am reducing the total allowable photocopy disbursement to $800. I also deduct the amount claimed for parking ($103.25) and tabs for joint exhibit books ($231.10). With those exceptions, I allow the disbursements as claimed in counsel's affidavit of legal fees and disbursements.

Conclusion

[18] Accordingly, the plaintiff shall have party-and-party costs of $23,500, and disbursements as claimed, minus the amounts deducted above.

LeBlanc, J.