SUPREME COURT OF NOVA SCOTIA
Citation: Wambolt v. Armstrong, 2013 NSSC 81

Date: 20130304
Docket: Hfx No. 347634
Registry: Halifax

Between:

Barry Wambolt

Applicant

v.

Elizabeth Armstrong, Glenn Spillett, Paul Douglas, and Douglas, Armstrong & Spillett Inc., a body corporate, in Halifax, in the Halifax Regional Municipality, Province of Nova Scotia

Respondents

DECISION ON COSTS

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	Written submissions only
Last Submissions:	December 6, 2012
Counsel:	Richard A. Bureau, for applicant Daniel F. Wallace, for respondents

Moir J.:

[1] *Introduction.* The respondents request solicitor and client costs until allegations of fraudulent misrepresentation were formally withdrawn on March 2, 2012, $22,812, party and party costs afterwards, and $500 for a motion to strike parts of the applicant's affidavit. They incurred disbursements totalling $4,456.11.

[2] The applicant proposes $18,250 for costs and $2,865.31 for disbursements.

[3] *Solicitor and Client Costs.* The grounds in the notice of application include claims that each respondent made fraudulent misrepresentations concerning the profitability of Douglas, Armstrong & Spillett Inc., the value of the business, and the addition of other businesses.

[4] These allegations were supported by statements in Mr. Wambolt's affidavit. For example, he gives evidence about statements he claims were made by all respondents and he refers to these as "untrue, inaccurate, misleading or false". Most seriously, the allegations were pleaded, and sworn to, by Mr. Wambolt

against Ms. Armstrong without his being able to recall anything said by her at any time.

[5] Mr. Wambolt disavowed the allegations of fraud at discoveries held in October of 2011, but they were not formally withdrawn until a couple weeks before the application was heard last March.

[6] The respondents point out that "[c]ases where allegations of fraud are made and found to be totally unfounded" are among the "special and rare cases" in which the discretion to order solicitor and client costs may be exercised: *Silvester v. Lloyd's Register of North America Inc.*, 2004 NSCA 17 at para. 41 and 42. They rely on *Mele v. Thorne Riddell*, [1997] O.J. No. 443 as support for their position that the award should be to the day Mr. Wambolt consented to an order withdrawing the allegations, rather than to the time when he privately disavowed them.

[7] Mr. Wambolt says that his disavowal at discoveries meant that the respondents did not have to concern themselves with defending the fraud allegations after October, 2011. He says that he clarified his affidavit at discovery

by admitting that he did not mean to attribute the misrepresentations to every respondent.

[8] "These circumstances are neither exceptional nor recognized as meriting an award ...". I respectfully disagree. A party who alleges fraud without evidence to support it commits a serious breach and exposes himself to full indemnity, even if he eventually sees his error and withdraws the allegation.

[9] I overlooked the withdrawal when I wrote the main decision and, in very brief reasons, decided to dismiss causes that had already been withdrawn (para. 74). While it does not preclude solicitor and client costs, withdrawal is relevant to whether the discretion should be exercised because counsel could stop preparing the defence of those causes once they were withdrawn and because any damage to reputation could be protected by public withdrawal.

[10] The respondents also rely on *Goulin v. Goulin*, [1995] O.J. No. 3115 and *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, [1998] O.J. No. 4221 which held that deterrence is a reason to award solicitor and client costs even if an allegation of fraud is later withdrawn. I am persuaded by those authorities.

However, in the present circumstances the subject is better handled by increasing party and party costs.

[11] The reprehensible allegations of fraud are mitigated by the private withdrawal four months after the proceeding was started. Mr. Wambolt was obligated to correct his affidavit and to publicly withdraw the allegations the moment he recognized his default. However, the private withdrawal was enough to stop work on defending the fraud accusations. Also, an order dismissing the fraud causes could have been obtained, if the respondents were very concerned that the allegations hurt reputation.

[12] The default is further mitigated by the public withdrawal just before the hearing.

[13] I will increase party and party costs to take account of the withdrawn allegations of fraud. In my view, this is sufficient to compensate the respondents and to deter others who may be quick to plead fraud.

[14] *Offer of Settlement*. The respondents' approach to the party and party part of their requested costs involves shoehorning the application into Tariff A "as if the hearing were a trial": Rule 77.06(2), then shoehorning it into the provisions for formal settlement offers in an action. The formal offer provisions are, as the heading of Rule 10.05 suggests, for a "formal offer to settle action". Applying these to an application is difficult and prone to error. In my view, it is better to treat the settlement offer here as a reason to increase party and party costs under Rule 77.07(2).

[15] In December of 2011, the respondents offered to settle the proceeding by paying $10,000. By then the bulk of the direct evidence was in place by way of affidavits, and discovery was complete. Acceptance would have provided nothing for Mr. Wambolt, as the case had to have cost more than $10,000 in counsel's time alone.

[16] I am prepared to provide a small increase because of the unaccepted offer.

Cancelled Settlement Conference

[17] The applicant submits as follows:

> Mr. Wambolt takes the position that any costs awarded to the Respondents should be reduced as a result of the Respondents agreeing to take part in a settlement conference and then cancelling shortly before it was scheduled to take place. Mr. Wambolt incurred unnecessary costs as a result of the Respondents actions.

[18] I have authority under Rule 10.12(2) to indemnify a party when the other "cancels a settlement conference" for which the party incurred expense. I think it best that the judge who was scheduled to preside at the conference make the determination. However, I would not order an indemnity without knowing all the circumstances, and I would not guess at the amount of the loss.

[19] *Motion to Strike Portions of Affidavit*. This was so bound up with the hearing of the application that it should be covered by the general award of party and party costs.

[20] *Party and Party Costs.* For the purposes of Tariff A, the amount involved is $100,000. The basic scale in Tariff A suggests $12,250 plus $6,000 for the three day hearing. This would provide a substantial indemnity against actual expenses.

[21] *Amount for Increases.* Mr. Wambolt complained, rightly I think, that the respondents' proposal for costs involved doubling. The claim for costs before disbursements was $45,171. However, fees billed totalled $36,483.75. Costs are for indemnification against the expense of litigation. In the case of a client represented by counsel, counsel's accounts mark the limit. Even allowing for the expense of submissions on costs and of finalizing the proceeding, the claim would exceed that limit.

[22] I keep this in mind when assessing the increase for the withdrawn allegations of fraud at $8,000 and the increase for the unaccepted settlement offer at $2,000.

[23] *Disbursements*. Mr. Wambolt says that I should deny as unnecessary $1,590.80 paid to have a court reporter transcribe Mr. Wambolt's evidence on cross-examination.

[24] The respondents' counsel was assisted by Ms. MacIsaac. He swears that he secured the transcript to assist with closing submissions “despite Ms. MacIsaac’s meticulous notes” because “it was difficult for me to determine what exactly Mr. Wambolt said during his testimony”.

[25] Mr. Wambolt points out that, in addition to Ms. MacIsaac’s meticulous notes, Mr. Wallace also had a recording of the testimony. While I do not doubt that Mr. Wallace found the transcript helpful to his preparations, I do not accept that it was so needed as to support indemnification.

[26] I will allow disbursements in the amount of $2,865.

[27] *Conclusion*. The respondents will have costs against the applicant for $28,250 plus $2,865 for disbursements.

J.