

SUPREME COURT OF NOVA SCOTIA

Citation: *Atiyah v. Twin Lighthouse Farm Ltd.*, 2013 NSSC 231

Date: 2013-07-16

Docket: *Syd*, No. 304367

Registry: Sydney

Between:

Heather Atyah

Plaintiff

v.

Twin Lighthouse Farm Ltd., and Joan LeRoy

Defendants

Costs Decision

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: January 14 – 22, 2013, in Sydney, Nova Scotia

Final Written Submissions: Ms. Atiyah – May 31, 2013

Ms. LeRoy – June 24, 2013

Counsel: Heather Atiyah, Plaintiff, in person
Joan LeRoy, Defendant, in person

By the Court:

INTRODUCTION

[1] Following seven days of trial, this Court rendered a written decision in favour of the Plaintiff Heather Atiyah on May 7, 2013 and reported as 2013 NSSC 147. Ms. Atiyah now seeks costs and disbursements against the Defendant Joan LeRoy given her success at trial. Written submissions were received from both Ms. Atiyah and Ms. LeRoy.

BACKGROUND

[2] From 2005 until 2008 Ms. Atiyah provided money, goods and labour to Ms. LeRoy and her business Twin Lighthouse Farms, in exchange for the boarding of her horses. In August of 2008, this arrangement abruptly ended, as did the friendship between the two parties. Thereafter, Ms. Atiyah spent considerable time and effort attempting to retrieve her personal belongings as well as three horses still located at Ms. LeRoy's property.

[3] At the conclusion of trial, it was determined that Ms. Atiyah was entitled to an award of \$25,000.00 in relation to her claim of unjust enrichment, \$6,693.34 in relation to the conversion of her personal property and \$10,000.00 in punitive damages. Ms. LeRoy's counterclaim alleging damage to her property and business, was dismissed.

POSITION OF THE PARTIES

Ms. Atiyah

[4] Ms. Atiyah is seeking party and party costs and disbursements. It is asserted that Scale 3 of Tariff A should be applied, resulting in base costs of \$9063.00. She further requests that a further \$14,000.00, being the permitted \$2000.00 per every day of trial, be added to the costs claimed.

[5] While self-represented at trial, Ms. Atiyah submits that she was represented for a significant period of time, up to several months prior to trial, and as such she should not be precluded from an award of costs. She further argues that the higher Scale 3 should be applied because of the added expenses incurred due to Ms. LeRoy's unpreparedness, resulting in an adjournment of earlier trial dates.

[6] In terms of disbursements, Ms. Atiyah claims a total of \$8675.25 which appears to be the vast majority of her actual out of pocket expenses. These are itemized in her affidavit filed May 31, 2013.

Ms. LeRoy

[7] Ms. LeRoy also filed written submissions with the Court. With respect, very little of the contents relate to the issues this Court must now consider and determine. She did raise however, two important points. Firstly, that Ms. Atiyah is claiming service fees in relation to serving Mr. Ginter, who she chose not to ultimately claim against at trial. Secondly, presumably in response to the claim for fees in relation to service on her, Ms. LeRoy asserts she was willing, and did when requested, attend at Mr. Khattar's office to retrieve documents.

ANALYSIS

[8] Civil Procedure Rule 77 governs the awarding of costs. Rule 77.02 clearly states that an award of costs, including the quantum is in the discretion of the presiding judge. Rule 77.03(3) states that the "costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise".

[9] Rule 77.06(1) governs costs to be awarded at the end of a proceeding. It provides:

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 Cost and Fees Act, a copy of which is reproduced at the end of this Rule 77.

[10] Rule 77.07(1) allows a judge to add to, or subtract from costs calculated as per a tariff. Rule 77.08 also permits a judge to "award lump sum costs instead of tariff costs".

[11] Disbursements are addressed in Rule 77.10(1) which provides:

77.10(1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[12] Turning now to an appropriate award of costs, I begin with a consideration of Tariff A. Although the presentation of the claim, defence and counterclaim may have been more difficult due to the parties being self-represented at trial, I see no reason to apply Scale 3. In my view, the basic scale, Scale 2, is appropriate. For an award between \$45,001 and \$65,000, this results in base costs of \$7250.00.

[13] As noted earlier herein, the trial took place over 7 days, resulting in an additional \$14000.00 to be added to the base costs. The resulting total, is \$21,250.00. Ms. Atiyah, although self-represented at trial, incurred legal expenses given her earlier representation. She attached to her affidavit, eight invoices from John G. Khattar Law Office Inc. documenting legal fees, exclusive of HST, in the amount of \$23,288.75.

[14] The actual legal fees paid, is in my view, a relevant consideration. Party and party costs have long been recognized as having the goal of making a “substantial contribution” to costs, but not a complete indemnity. In the present instance, to award the Tariff costs as calculated, would come very close to a complete indemnity, and exceed a “substantial contribution”. Exercising the discretion in Rule 77.08, I consider that lump sum costs of \$15,000.00 are appropriate in the circumstances.

[15] I turn now to consider the disbursements claimed. Ms. Atiyah attached to her affidavit, various invoices and receipts documenting the payment of the disbursements claimed. There is no issue in my view that the expenses were actually incurred. That however, is not the only consideration. Ms. Atiyah must also establish that the disbursements claimed were reasonable and necessary for the proper conduct of the litigation.

Sheriff's Fees (Recovery Order)

[16] Ms. Atiyah incurred fees in relation to the issuance and execution of an interlocutory recovery order. I am satisfied this disbursement of \$287.13 is reasonable and necessary given the circumstances of this case.

Court filing and Law Stamp

[17] Ms. Atiyah claims \$754.93 in relation to filing fees and the law stamp. There is appropriate invoices attached to her affidavit to support the claimed amount, and the Court is satisfied having heard the trial, that these expenses were reasonable and necessary.

File Administration fees (John Khattar)

[18] The sum claimed, \$50 appears to come from the legal accounts attached to the affidavit. Courts regularly disallow a file administration fee when counsel are seeking such an amount against a client at taxation. Here, there is no information provided by Mr. Khattar why this amount was charged. Accordingly, I cannot

assess whether it was reasonable or necessary, and do not therefore expect Ms. LeRoy to be responsible for same.

Photocopies, binding, printing

[19] Ms. Atiyah claims the sum of \$1037.59 in relation to copying expenses. Her affidavit does not specify how this amount was calculated, but by reference to the various legal bills, and Kwik Kopy receipts, the Court was able to deduct how this amount was reached. The affidavit further does not attempt to explain why the expenses were necessary, or justify the reasonableness of the expenditures.

[20] The Court is prepared to acknowledge that this claim, was very much based upon documentary proof of various expenditures, as was evidenced by the extensive exhibit books submitted at trial. The same documents would have been disclosed by virtue of Affidavits of documents. Accordingly, the lack of explanation in the affidavit is not fatal to some re-imbursement being considered, but there are some expenses claimed under this particular heading which the Court must reject, without more detailed explanation.

[21] Ms. Atiyah claims \$90.34 in relation to photocopies received from the Sydney Justice Center. She provides no explanation as to what was being copied or why it was required. These are not claimable. Similarly, the Khattar invoices contain a further \$90.00 charged in relation to photocopies, again with no explanation as to what the copies were for. I cannot conclude in the circumstances that these were reasonable and necessary.

[22] The bulk of the expenses under this heading are contained in several invoices from Kwik Kopy, most of which provide a helpful description of what was being charged. These disclose that not only were the cost of copies charged, but binding fees, the cost of tabs, and in some instances, labour for the insertion of tabs.

[23] One only has to sit in a Courtroom and attempt to find documents in an untabbed exhibit book or lengthy affidavit to gain an appreciation for the lowly "tab". In a matter involving the introduction of a number of documentary exhibits, the cost of tabs and binding for documents which must be filed with the Court are reasonable and necessary. I cannot however, say the same for the fees charged to compile an exhibit book, including the labour incurred inserting tabs in the proper place. Labour charges included in the Kwik Kopy invoices are not appropriate in my view.

[24] Without an explanation of the charges, it is difficult to appreciate what may have been necessary in terms of copies, binding and tabbing. As noted above however, it is clear that Ms. Atiyah had significant copying, binding and tabbing required to present her case, in an organized and clear fashion to the Court. With all of the above in mind, I consider an award of \$500.00 to be appropriate in relation to these expenses.

Fax and telephone (John Khattar)

[25] The \$14.00 claimed by Ms. Atiyah appears to come directly from charges on Khattar invoices. Without an explanation as to why such expenses were incurred, I am not prepared to order Ms. LeRoy be responsible for same.

Discovery fee and Discovery Transcript

[26] The claim of \$964.50 is documented. Having heard the trial, I can conclude that undertaking discovery examinations would have been necessary, and the quantum claimed is reasonable.

Witness Fees (adjournment and trial)

[27] Ms. Atiyah has claimed that \$229.44 was expended on witness fees. In her materials she has provided no explanation as to how this amount was calculated, and the only documentation appearing to relate to witness fees is a copy of Mr. Khattar's trust ledger documenting payments to various individuals who testified at trial. The sums itemized in the trust ledger amount to \$165.20, which I am prepared to infer are in fact witness fees. Being unable to ascertain from where the additional sum claimed is derived, I am not prepared to award same.

Fees for service of documents on Joan LeRoy and Paul Ginter

[28] Ms. Atiyah presented 13 invoices totaling \$916.70 in relation to service of documents on Ms. LeRoy and Mr. Ginter. In her memorandum, she asserts that this included not only documents which require personal service, such as pleadings, but most other documents as Ms. LeRoy frequently denied receiving documents mailed to her by the Khattar law firm.

[29] I am not prepared to accept the full amount claimed for two reasons. Firstly, by the time of trial, Ms. Atiyah had chosen not to pursue a claim against Mr. Ginter. Ms. LeRoy should not pay for service fees in relation to documents provided to him. Secondly, there is no evidence before me from the Khattar firm

or Ms. Atiyah, as to why it was felt reasonable and necessary to personally serve Ms. LeRoy with documents which would normally be mailed.

[30] I have reviewed the invoices provided and am satisfied that there are a number of occasions when Ms. LeRoy was reasonably and necessarily personally served. I am prepared to award \$600.00 in relation to the above service expenses.

Fees for service of witness subpoenas

[31] Ms. Atiyah provided invoices relating to the service of subpoenas on a number of witnesses. The invoices total \$1156.49, the sum claimed by her. I am prepared to allow the amount claimed, less one invoice in the amount of \$74.75 in relation to service on a “Shannon Boutilier Peters”. This individual was not called as a witness at trial, and without an explanation from Ms. Atiyah as to why this expense is accordingly reasonable and necessary, I decline to award it. The sum of \$1081.74 in relation to service of witness subpoenas is appropriate.

Miscellaneous witness expenses

[32] Ms. Atiyah claims under three different headings, various expenses which all in some fashion, relate to expenses associated with having witnesses present for trial. These include air fare, car rental, hotel accommodations, meals and a flight cancellation fee. There is nothing before the Court, other than the bare invoices, to justify why such expenses are “reasonable and necessary”. Although the Court has broad discretion to consider such claims, such are the exception rather than the rule. Normally, witnesses who are properly served with a subpoena and prescribed witness fees are expected to attend at Court, without further compensation for expenses or their time. There may be circumstances where the Court would consider additional expenses, but it is the burden of the claiming party to provide a cogent and compelling explanation as to why such are reasonable and necessary in the circumstances. Absent such an explanation in the present case, I am not prepared to award the sums claimed.

Cost of transporting horse Breeze

[33] Ms. Atiyah claims \$100.00 being the cost, post-decision, of transporting her horse from the property of Ms. Buchanan Beaton, to a new stable. This in my view is not an appropriate trial disbursement and is not allowed.

[34] Based on the above, the total amount of disbursement allowed is \$4353.50.

CONCLUSION

[35] The Plaintiff Heather Atiyah is entitled as against the Defendant Joan LeRoy to party and party costs in the amount of \$15,000 plus disbursements of \$4353.50.

J.