SUPREME COURT OF NOVA SCOTIA

Citation: *Northeast Equipment Ltd. v. 3238633 Nova Scotia Ltd*, 2016 NSSC 347

Date: 20161206
Docket: Hfx No. 437820
Registry: Halifax

Between:

Northeast Equipment Limited

Applicant

v.

3238633 Nova Scotia Limited (formerly known as "G.A, Turner Plumbing & Heating Limited"), 1109082 Nova Scotia Limited (formerly known as "Greg Turner Plumbing and Heating Limited"), Gregory A. Turner, Bernice Turner, Brenda Turner Schroder, and Leanne Turner Wells

Respondents

Decision on Costs

Judge:	The Honourable Justice Patrick J. Murray
Written Decision:	December 6, 2016
Counsel:	Blair Mitchell for the Applicant John O'Neill for the Defendants

By the Court:

Introduction

[1] Northeast commenced legal action claiming that G.A. Turner et al (the Respondents) committed acts of oppression under the *Companies Act* to avoid payment of a judgment held by Northeast against Turner.

[2] By decision dated September 12, 2016, I dismissed Northeast's claim against the Respondents, because it failed on two occasions, to follow through on its claim, which was an Application in Court. Further reasons are contained in my judgment.

[3] The Respondents now seek costs against Northeast for "defending" the legal proceeding. They seek to be reimbursed for their total legal costs, on a solicitor client basis.

[4] The amount claimed by Turner is $25,300.00 plus disbursements for a total of $26,011.71.

[5] The position of the parties on costs is as follows:

Northeast's Position

[6] Northeast does not contest the claim for disbursements made by the Respondents in the affidavit of Mr. Turner.

[7] As Applicant it states that the only substantive "inter-partes" proceeding, other than the motions for directions, was the appearance before Justice Robertson on October 29, 2015, where the Respondents sought dismissal of the proceeding. Costs were awarded on that appearance in the amount of $2,000.

[8] Northeast argues that the Respondents' cost submissions rest entirely on the premise that there has been a disposition on the merits. That is not the case says Northeast. It submits my decision made that quite clear. Northeast says the dismissal was as a result of its procedural failures as Applicant.

[9] The affidavit of Ms. O'Hara was filed by Northeast. In large measure it was submitted to show that Northeast's application had merit, in claiming that it was oppressed by the Respondents in relation to an earlier action by Northeast, against G. A. Turner Plumbing and Heating Limited, (Halifax No. 436323).

[10] Northeast's brief states as follows at page 3:

> The evidence of Brenda Schroder and Greg Turner on examination in aid both support the conclusion that there were ample grounds to support the Applicant's claim for oppression asserted in this case.

[11] Paragraph 19 of Ms. O'Hara's affidavit states

> 19. On examination also on January 15, 2016, Brenda Schroder testified that she was the Office Administrator and Bookkeeper for the Defendant, that as of July 2015, the Defendant had an account receivable in the area of $270,000 from a company called Plan Group. Attached and marked Exhibit "M" is a true copy of several extracts from the transcript of the Examination in Aid of Execution of Brenda Schroder. (The page numbers of this Exhibit are numbered in the same way as the page numbers of the Greg Turner extracts in Exhibit "L" are.)

[12] The brief of the Applicant submits that the receivable due to G. A. Turner Plumbing and Heating Ltd. was to be transferred to the new company, and go to its operating expenses. Northeast refers to the discovery evidence of Ms. Schroder in stating that the Plan Group funds would "flow" to the new company but was "stopped by revenue Canada". (Exhibit "M" at page 22 – Ms. O'Hara's affidavit)

[13] The merit of the application is a relevant consideration on costs. Whether the Application was frivolous or vexatious is a matter which impacts on the awarding of solicitor client costs. It is however, not the only consideration.

[14] Northeast's position is that the application was brought in good faith when the Applicant discovered an attempt by the Respondents to avoid payment of the $189,000. judgment obtained against the predecessor company, "G. A. Turner," which it referred to as "Oldco".

[15] The Application they submit, involved a substantial claim and was well advised.

[16] Northeast's concern was the transfer of the name, goodwill, records and other assets. These were pleaded as grounds for the oppression remedy.

[17] Northeast says the Notice of Contest filed by the Respondents was little more than a general denial.

[18] There has been no determination of an unfounded claim or legal process. The Applicant cites ***Big X Holdings Inc v. Royal Bank of Canada***, 2015 NSSC 350, in support of its position that the merits of the Application have never been tested.

[19] The Applicants therefore submit that their cost exposure on a "stand alone interlocutory motion", according to Tariff C bring costs in the range of $ 750 - $ 1,000. Northeast suggests taking a multiplier of no more than five (5) times that amount together with disbursements, to arrive at a just amount for costs in the entire proceeding. This would be a maximum of $5,000. plus disbursements.

[20] Northeast further argues the corporate Respondents had an adjudicated and lawful liability on summary judgment to the Applicants, that they are now attempting to avoid by requesting that costs be payable to the individual Respondents.

[21] The Applicant further says there is no basis for the Respondents' claim that they are entitled to solicitor client costs because this was an oppression remedy sought by the Applicant. The Applicant states there is no basis to award such costs where the claim of oppression has been stopped.

[22] Instead, Northeast argues the Respondents must look to their own conduct. They are in no special or unique position simply because of their own misfortunes, which include circumstances of divorce, non-payment of an account receivable, or income tax problems.

[23] There is no evidence says Northeast supporting who it was that funded the legal fees for the Respondents and who is said to be responsible for such fees.

[24] Similarly, Northeast submits the Court should reject the Respondents' cost claim that settlement offers were made and rejected. It says those offers are not relevant and were made before any steps were taken that give rise to the oppression claim.

[25] In addition Northeast submits that an offer of $18,000. "all inclusive" for a claim of $ 189,000. is no measure of success.

[26] I note that according to Mr. Turner's affidavit, the counter offer from the Respondents was for $35,000.

[27] Finally, the Respondents argue that the Respondents have failed to prove their claim by failing to provide proper accounts, with docketed legal time. In addition they provided no terms of retainer.

[28] Referring to *Rule 77.13* the Applicant argues that the accounts, in the form they are presented, are not sufficient for the Respondents to discharge the burden of showing the accounts are reasonable. The Applicant says the accounts "defy assessment". In short, the level of accountability is not there. There is no cogency to the accounts. The Respondents' failed in their motion for summary judgment.

[29] Northeast therefore says that costs should be assessed with respect to the motion that gave rise to the Order for dismissal, and not on the merits of the application, which was well founded at the time it was commenced.

Respondent's Position

[30] The Respondents state they are following the Applicant's lead in seeking solicitor client costs, this being an oppression action. In oppression actions it is common for the Courts to award such costs. (***Giffin v. Soontiens***, 2012 NSSC 354)

[31] The Respondents submit that G. A. Turner had a long relationship with the Applicant but encountered financial difficulty. They submit the allegations of wrong doing have been dismissed. That Applicant's pleadings are not evidence of oppression.

[32] The Respondents say they took Northeast's claim seriously. In addition to claiming $189,696.38, Northeast claims included punitive and exemplary damages. The Respondents state the litigants on both sides must bear the financial consequences of their actions. Those consequences include substantial cost awards.

[33] The Respondents refer to *Rule 10.03* which allows the Court in assessing costs to take into account a written offer of settlement, whether made formally or informally. The Respondents argue it should have been clear from the pre-litigation disclosure that the Company was unable to pay the debt.

[34] The Respondents say that Northeast cannot and should not distance themselves from offers that were made on February 9 ($18,000.) and February 12, 2015 ($35,000.). The Respondents say it was clear they were not "looting" the store.

[35] Rather than mitigating its losses, the Respondents argue Northeast chose to pursue an oppression remedy, which was without merit.

[36] The Respondents claim their actual legal expenses of $25,300. plus disbursements of $911.71 for a total of $26,211.71.

[37] In claiming solicitor client costs the Respondents submit it was the inaction of the Applicant that forced the Respondents to deal with this litigation over a period of 18 months. They say the fact that they did not follow two (2) separate orders for directions, is alone sufficient to justify an award of solicitor client costs.

[38] They submit their case grows even stronger when one considers the settlement offers that were made. The Respondents are seeking to be indemnified for their actual costs which includes essentially four (4) court appearances over the 18 months:

1. April 23, 2015 – Motion for Directions;
2. October 29, 2015 – Motion for Dismissal;
3. January 25, 2016 – Motion for Directions; and
4. August 4, 2016 – Motion for Dismissal and Abuse of Process.

[39] The Respondents state they have been completely successful. They ask that the cost award be allocated only to three (3) individual Respondents. These Respondents they say, financed the litigation because the two corporate Respondents ceased operations in 2009 and in June/July of 2015.

[40] The Respondents state Justice Robertson made a similar allocation, when she awarded costs of $2,000. at the October 29, 2015 Motion for Dismissal.

[41] The Respondents submit this $2,000. is a "stand alone" amount which should be deducted from the total cost amount, after it is assessed.

Decision - Costs

[42] I have carefully considered the position of the Applicant and the Respondents with respect to the costs.

[43] The Applicant's submission spent a good deal of time on the merits of the Application. This is but one consideration in the matter before me. The merits are relevant to whether this was a frivolous and vexatious application.

[44] In my decision, I was satisfied there was an abuse of the Court's process, due to inaction on the Applicant in carrying through with the Application. I found the inaction and delay to be unacceptable.

[45] I did not find that the Application was without merit. Having considered the submissions of each party, I am not satisfied the Application was frivolous or vexatious, as suggested by the Respondents.

[46] The Respondents further argue that solicitor client costs generally follow where an oppression remedy is claimed. That is the case where the Applicant succeeds, the notion being to award full indemnity to ensure there is no further oppression.

[47] That is not the case here. The successful party, is the one against whom the oppression was alleged. This is not quite the same thing. It must however be acknowledged that it placed the Respondents "defence" of the Application in a heightened position, given that Northeast claimed full indemnity, including penal sanctions such as punitive damages.

[48] I accept the Respondents' submission that they took the claim seriously at every stage of the proceeding. This is entirely relevant to the cost issue.

[49] In terms of whether the settlement offers, made informally in the debt action ought to be considered, I am not satisfied they are determinative of the Respondents' claim for costs. While they are of some relevance, they were made early on, and before the commencement of the oppression application on April 2, 2015.

[50] More importantly I found in my decision that the two proceedings, while related, were still separate, one being an action that resulted in judgment.

[51] The crux of this matter in terms of costs, is my finding that there was an egregious breach of the *Rules* by the Applicant. Solicitor client costs are intended to address misconduct and abuse.

[52] The *Civil Procedure Rules* clearly intend this to be the case. In particular, *Rule 77.09* speaks of "substantial indemnification toward the costs of necessary services", when an abuse is found under *Rule 88.02*. Specifically, *Rule 77.09* enables the Court to give consideration to indemnifying a party for its losses resulting from the abuse.

[53] Primarily it is *Rule 77.03* which addresses solicitor and client costs, which a judge may order be paid to a party in "exceptional circumstances recognized by law".

[54] In the present case, I refer to my finding at paragraph 81, that dismissal of a proceeding for abuse of process is an "extreme remedy, and rarely granted".

[55] This would readily suggest that on its face, the Respondents claim for "full costs" should be granted.

[56] In my respectful view there are a number of considerations that are relevant to this determination.

[57] The Respondents ask that the cost award be restricted to three individuals. In terms of the form of accounts, while they provide the total time expended, detailed time entries are not included. They have given reasons for this format.

[58] The Respondents have also stated that "conflicts" was an issue for them in an attempt to minimize costs and allow Mr. O'Neill to represent all of them. In addition, they have been awarded costs in respect of one of the four (4) court appearances, that being October 29, 2015.

[59] The Respondents have argued in the alternative, that a substantial indemnity in the circumstances of this case would be an award in the range produced by Scale 3 of the Tariff, as it approximates the actual costs incurred by the Respondents.

[60] In totality, I have been persuaded that a just and appropriate award of costs would be an amount in the range of Scale 2 of the Tariff. Rather than awarding full costs, I prefer in these circumstances, *Rule 79.09* which calls for a "substantial indemnification" in cases of abuse.

[61] In addition to the reasons I have mentioned, I am not satisfied that the total time expended for the October 29, 2015 appearance should be re-assessed. I realize that the 16 hours claimed for that appearance in the Solicitor's Bill of Costs, is for solicitor client costs. I am however, concerned with the aspect of deciding what has already decided by Justice Robertson, said award being the amount of $2,000.

[62] There is as well the time expended on the Summary Judgment motion, which the Respondents' counsel has acknowledged was not available on the evidence under *Rule 13*.

[63] I have decided that a just cost award granted in these circumstances is $15,500. plus the $2,000. previously awarded for a total of $17,500. plus disbursements.

[64] In terms of the Respondents request to allocate the costs to the individual Respondents, this was a matter of some difficulty.

[65] No clear authority was provided by Respondents' counsel. *Rule 77* however addresses allocation in some respect. There is of course the general discretion to make any order about costs that will do justice between the parties. (*Rule 77.02*)

[66] *Rule 77.03* states a judge may order one party to pay costs to another, two or more parties to jointly pay costs, or that liability for party and party costs may be fixed in any other way.

[67] *Rule 77.11* allows a judge to order set off against another award or any other amount.

[68] *Rule 77.10* says that a provision in an award for any apportionment applies to disbursements unless a judge orders otherwise.

[69] The two corporate Respondents are parties. The Order for Summary Judgment in the debt action was obtained against "G. A. Turner Plumbing and Heating Limited".

[70] I made no finding on the merits of this Application, but found it to be a separate proceeding from the debt action.

[71] A set off of any cost award has not been requested by the Applicant. The reason for assessing costs is to indemnify a party for its expense in the litigation, in whole or in part. Thus, the principle that "costs follow the result".

[72] A set off of this cost award would in my view, defeat the entire purpose of the awarding costs in this proceeding. It would not be in keeping with the general principles of costs. Although it is with some reluctance, I will make an order similar to that of Justice Robertson, that being to award costs to the three individual Respondents, without set off against another award of costs or any other amount.

[73] In my view this is also in keeping with the reasoning of Justice Robertson's cost order granted on October 29, 2015.

Conclusion

[74] Costs shall be payable to the Respondents Gregory Turner, Brenda Schroder and Leanne Wells in the amount of $17,500.00 plus disbursements of $911.71 for a total of $18,411.71.

[75] Order accordingly.

Murray, J.