

SUPREME COURT OF NOVA SCOTIA

Citation: *3021386 Nova Scotia Limited v. Municipality of the District of Barrington, 2019 NSSC 337*

Date: 20191118

Docket: Hfx No. 309535

Registry: Halifax

Between:

3021386 Nova Scotia Limited, a corporation

Plaintiff

v.

Municipality of the District of Barrington, a corporation, Tri-County Regional School Board, a corporation and Donald G. Harding

Defendant

COSTS DECISION

Judge: The Honourable Justice Christa M. Brothers

Written Submissions: September 5 and September 16, 2019

Counsel: Christopher I. Robinson, for the Plaintiff
Ian Dunbar and Robert Mroz, for the Defendant, Tri-County Regional School Board
Bruce Outhouse, Q.C., and Justin Adams, for the Defendant, Donald G. Harding, Q.C.

By the Court:**Overview:**

[1] The Court dismissed two summary judgment motions in *3021386 N.S. Ltd. v. Barrington District (Municipality)*, 2019 NSSC 224. The Court indicated that if the parties could not agree on the appropriate order for costs arising from the motions, the Court would consider submissions either in person or in writing, as the parties chose. The parties provided written submissions. Having no questions for the parties, this is the decision of the Court.

Issue

[2] The single remaining issue before the court is the quantum of costs to be awarded to the plaintiff after the dismissal of the motions for summary judgment advanced by the Tri-County Regional School Board (the “Board”) and Donald G. Harding.

Positions of the Parties

[3] The plaintiff argues that an award of costs providing a substantial contribution towards the plaintiff’s actual incurred expenses is appropriate. The plaintiff seeks a lump sum award of \$21,000, divided equally with each defendant paying \$10,500, payable forthwith. The plaintiff argues that Tariff C should be departed from and that it is “just an appropriate in the circumstances” to exercise the Court’s discretion and refuse to apply the Tariff. The plaintiff argues that the defendants advanced “ill-advised motions for summary judgment on the evidence”. The plaintiff has also described the summary judgment motions as “imprudent or injudicious”.

[4] The plaintiff argues that a lump sum of \$21,000, being approximately 66% of the plaintiff’s actual legal expenses, should be awarded, or an award pursuant to Tariff C using a multiplier of 3.5 or 2.

[5] The Board agrees that the plaintiff is entitled to costs and that costs should be payable forthwith. The Board argues that there are no unique circumstances requiring a departure from the tariff and argues that the Board’s summary

judgment motion consumed less than one day of court and consequently costs in the amount of \$2000 would be appropriate.

[6] Mr. Harding argues that there is no reason to depart from Tariff C and that an amount of \$2000, payable forthwith, is appropriate.

Analysis

[7] The starting point is the general rule that costs should be awarded to the successful party in the amount provided by the tariffs. (*Southwest Construction Management Ltd. v. EllisDon Corporation*, 2018 NSSC 270, and *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSSC 52.)

[8] Tariff C provides the following with respect to the appropriate range of costs after a motion in Chambers:

Length of Hearing of Application	Range of Costs
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1000
More than ½ day but less than 1 day	\$1000 - \$2000
1 day or more	\$2000 per full day

[9] Both defendants are only liable for the costs associated with their own unsuccessful summary judgment motions. Both defendants took approximately a day for their motions. The rest of the Court’s time was utilized addressing the defendants’ motion to strike portions of Mr. Anthony’s affidavit (the “Anthony Affidavit”). I agree with counsel that the time it took to address the Anthony Affidavit should not factor into an award of costs. For this conclusion, I rely on *Drummond v. Cheers Burger Emporium & Lounge*, 2014 NSSC 52.

[10] Tariff C acknowledges the discretion to depart from the Tariffs when necessary. In particular, Tariff C states:

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.

[11] In addition, a multiplier may be added to those amounts where the motion is determinative of the entire matter:

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 permanent injunction.)

[12] Tariff C specifically contemplates that the Tariff can be departed from where there is a successful application for summary judgment. These motions were not successful. Consequently, I do not consider it appropriate to add a multiplier.

[13] While the plaintiff has provided evidence that their costs, associated with the summary judgment motions are significantly more than the tariffs, I also find that this does not result in an automatic justification to depart from the tariffs. (*Homburg v. Stichting Autoriteit Financiële Markten, supra*)

[14] The plaintiff relies on the decision in *Armoyan v. Armoyan*, 2013 NSCA 136, to justify departure from the tariffs. *Armoyan, supra*, is distinguishable from the case at bar. That matter was extremely complex and required ten days of hearing over 11 months. It did not at all resemble a conventional chambers motion.

[15] Even in the extreme case of *Coady v. Burton Canada*, 2012 NSSC 257, affirmed 2013 NSCA 95, the court did not apply a multiplier of 3.5 as suggested by the plaintiff in this case. *Coady, supra*, involved a six-day motion for summary judgment which included a day of cross-examination and five days of oral argument. Justice Warner took into account the following in deciding that costs should be in the amount of \$24,000 after applying a multiplier of two.

- The motion was a complex matter;
- It was of great importance to all parties;
- The possible quantum of damages was unknown but the injury to the plaintiff appeared to have been very serious (significant physical injuries); and,

- The motion was originally scheduled for one day but consumed six days.

[16] I agree with the defendants. Simply because the court found that there were material disputes of fact does not render the defendants' summary judgment motions improper or deserving of censure through the imposition of increased costs. I agree with the defendants that the assessed costs should be based on a one-day hearing per motion. The parties agreed to have the motions heard consecutively, with each of the defendants' motions requiring approximately one day. I note that none of the time taken with respect to the motion to strike portions of the Anthony affidavit will be judged as going towards costs against the defendants. Many of the impugned paragraphs were eventually agreed to be struck.

[17] The court acknowledges the general discretion to depart from the tariffs and award lump sum costs or add to the tariff costs, but there must be reason to do so. I do not find that the plaintiff has satisfied me that this case possesses some special characteristic which would justify a departure from Tariff C (*Keltic Transportation Inc. v. Montgomery*, 2014 NSSC 414).

[18] The plaintiff has advanced the following reasons as to why a lump sum should be ordered.

1. The extent of the plaintiff's legal account;
2. The importance of the issues to the plaintiff;
3. The alleged imprudence of the defendant's motions; and,
4. The complexity of the proceedings.

[19] The quantum of the plaintiff's legal account cannot, on its own, justify a departure from the tariffs. Furthermore, the affidavit of Ms. Voicu does not provide sufficient evidence as to the basis of the actual legal expenses incurred. There is no breakdown of what work was done or how much time was expended in relation to this work. For example, how much time was spent drafting the Anthony affidavit, which ultimately had several portions struck, and how much time was docketed for the respective motions?

[20] While the issues certainly were important, they are the same issues in all summary judgment motions. There is no standard rule that unsuccessful summary judgment motions should be the basis of a departure from the tariffs.

[21] While the Court did not agree with the defendants that this case was proper for a successful summary judgment motion, that does not mean that the parties brought the motions unreasonably, frivolously, or imprudently. While there was much material filed on the motion, which required time to prepare, there was nothing inherently complex about the motions.

Conclusion

[22] Each defendant is ordered to pay \$2,000 to the plaintiff, payable forthwith. These amounts will be inclusive of disbursements.

Brothers, J.