SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Huphman (Re)*, 2020 NSSC 10

Date: 20200109
Docket: No. 39813
Registry: Halifax
Estate Number: 51-2088256

In the Matter of: The bankruptcy of Randall Rudolph Huphman

BETWEEN:

T&J Delaney Contracting Limited

Applicant (Appellant)

And

Grant Thornton Limited, trustee in Bankruptcy of Randall Rudolph Huphman

Respondent

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	Last written submissions dated November 6, 2019
Counsel:	Michael K. Power, QC, for the Applicant, T& J Delaney Contracting Limited Shawn M. O'Hara, for the Trustee, Grant Thornton Limited G.F. Philip Romney, for the intervenors, Randall Rudolph Huphman and Judith Huphman

Balmanoukian, Registrar:

[1] The parties, unable to reach consensus on costs, return to Court.

Background

[2] By decision reported at 2019 NSSC 280, I upheld the Trustee's disallowance of Delaney's claim of security which Delaney asserted by virtue of a builders' lien, filed against the debtor's property at Brooklyn, Nova Scotia. I did so because it was filed "out of time" under the *Builders' Lien Act*, RSNS 1989 c. 277. The Trustee reached the correct result, although not for the correct reasons, as I recounted in what I will refer to herein as the "2019 decision."

[3] Nothing in that finding affects Delaney's claim as an unsecured creditor, or the Huphmans' claims for abatement or reduction in the amount payable due to alleged deficiencies or shortcomings in the work performed. Although there was much evidence on "what was and was not done, and why," in order to determine what was the "last day worked" for the purposes of the *Builders' Lien Act*, I did not determine the merits of the work or the alleged defects; I only determined the validity, or otherwise, of the lien claimed.

[4] Mr. Huphman, having previously filed for his third bankruptcy and now engaged in a consumer proposal, intervened in these proceedings. So did Mrs. Huphman, who is also now so engaged in a proposal. Delaney objected both to this intervention; and, previously, the proposals. Neither objection was successful, although I specifically indicated when allowing the intervention that it was subject to later submissions as to costs. That day of reckoning has arrived.

Procedural History

[5] The timing of the Huphmans' application to intervene is recounted in paragraph 5 of my 2019 decision. In a nutshell, their counsel wrote to the Court on December 20, 2018 – the hearing had been (re)scheduled for January 10, 2019 - asking for leave to intervene. That counsel, Mr. Romney, added that he was closing for the holidays *the next day*, returning to the office only three days before the scheduled hearing (January 7, 2019). In essence, Mr. Romney presented the Court with a Hobson's choice. He compelled one of two results, only one of which was fair to the Huphmans.

[6] First, Mr. Romney's request could result in a unilateral adjournment. This included being unavailable for a subsequent conference call (January 3, 2019) and

not making anyone in his office so available either (although the office was staffed and had actual knowledge of that conference call).

[7] Second, Mr. Romney potentially left his clients under the "wheels of the bus," for if the Court proceeded as scheduled, the Huphmans would be deprived of any effective intervention, or perhaps any intervention at all. That was neither just nor justice.

[8] In my view, counsel forced the hand of the Court – I again choose the term "unilateral adjournment" – if there was to be any effective standing to the Huphmans and their right to be heard. Mr. Romney's acceptance of the file on the eve of an office closure which only ended on the eve of the scheduled trial should not be condoned or sanctioned in any way whatsoever. For that reason, although I allowed the intervention and inevitable adjournment that flowed from that, I specifically left the question of costs on this count for subsequent consideration – that is to say, until now.

[9] It is worth noting, in fairness to all parties, that this was not the only adjournment. I again refer to paragraph 5 of the 2019 decision. The Huphmans did not ask to be added at any prior stage.

Position of the Parties

[10] The Trustee says its disallowance has been vindicated and seeks solicitor-client (or enhanced party-and-party) costs against Delaney. It claims to have incurred solicitor-client costs of $17,537.50 plus disbursements and HST, for a total of $20,927.77. In the alternative, it seeks enhanced party and party costs of $8,250.00.

[11] Delaney says that notwithstanding its failure on appeal, it did not act unreasonably and that the Huphmans remain seized of the work that Delaney did; and that the Trustee did not proceed reasonably in its inquiry. It further outlines the timing and nature of the Huphmans' intervention, noted above. As a result, it submits that there should be no, or minimal costs. Delaney says that if any costs are awarded to the Trustee, they should be the property of the estate (or, presumably now that the Huphmans are in a proposal, paid in addition to the terms of that proposal). It also seeks its costs for the adjourned date in the amount of $2,100, either as a direct award or as a set-off of any costs awarded against Delaney.

[12] The Huphmans say they have been successful, and that both Delaney and the Trustee acted in a high-handed and capricious fashion; and that they, being of

modest means, should receive solicitor-client costs; counsel does not say against whom, although their brief is generally devoted to what they claim is the egregious conduct of Delaney. It claims solicitor-client costs of $8,124.30.

This Court's Jurisdiction Over Costs

[13] This Court has statutory jurisdiction over costs in three principal ways.

[14] First, Section 192(1)(i) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA") gives me jurisdiction to "tax or fix costs and to pass accounts." Principally, those pertain to accounts of trustees and counsel acting for trustees; counsel for the Trustee is correct that I must tax all accounts over $2500 (*Bankruptcy and Insolvency Act General Rules*, CRC 1978 c. 368 as amended, Rule 18 et seq.) That is not of primary application here as I am dealing with entitlement to and, as a corollary, quantum of costs <u>as among litigants</u>.

[15] For clarity, this decision relates only to the claim for costs as between the parties. The Trustee's solicitor-client legal costs remain to be taxed as between the Trustee and its counsel as required by Rule 18.

[16] Second, and more directly applicable to this case, Section 197 of the *BIA* gives me a general discretion over costs; the section goes on to allow for costs to

be taxed, or for "a sum to be paid in lieu of taxation or of taxed costs" (Section 197(2)) – that is to say, I may award a lump sum.

[17] Third, *BIA* General Rule 3 incorporates provincial rules of "ordinary procedure" where not supplanted by the *BIA* or the *BIA General Rules*. While, as noted, the *General Rules* do have costs provisions, they are neither exhaustive nor wholly displacive of the Court's s. 197 discretion, nor of the provincial Civil Procedure Rules; Rule 77 is of primary application in this case.

Analysis

[18] It is true the Trustee's disallowance of security was correct; however, it was not for the correct reasons. As I recounted in the 2019 decision, the Huphman file was subject to a number of "touches," not always with the most efficiency. It was essentially admitted that the Trustee's analysis of the "last date worked" was incorrect, although in the end result Delaney was still out of time in filing its claim for lien.

[19] As for Delaney, I found that not only the claim was out of time, but that it took on a self-serving and convenient view of the facts as it saw them. That said, I did not go so far as to find fraud or deception, although certain of Delaney's

actions (such as “whiting out” the date of last work) and certain of its views stretch the bounds of credulity.

[20] It is also true, as pointed out by Delaney’s counsel, that the Huphmans have the benefit of the work done. Although the quality and value of that work is in dispute, they do have their pad, septic, and driveway and are living in the home. Delaney will get paid only what gets serviced by the proposal, assuming its due performance. It is also true that, at the time of his original filing, Mr. Huphman was a third time bankrupt.

[21] I disagree with Delaney that this calls for no costs or nominal costs. The Trustee could have done better; it was right for the wrong reasons. While Delaney may not have crossed the Rubicon from convenient understanding to civil fraud, it at least got its feet damp. And while the Huphmans do have the value of the work done, that is a separate issue entirely from whether Delaney was secured or not for the debt arising from that work.

[22] I further note that much of the Delaney affidavit contained material of little or no relevance to the issues before the Court, exacerbating the length and complexity of the proceeding.

[23] I also disagree with the Trustee that it is entitled to solicitor-client, or enhanced party and party costs. I have noted where its work fell short both here and in my 2019 decision. This battle of Brooklyn was not the Trustee's finest hour.

[24] The Trustee seeks as an alternative to solicitor-client costs, a Rule 77, Tariff C, Basic Scale tariff for a ½-1 day hearing ($1,000 to $2,000) multiplied by a "minimum factor of 4," although Tariff C Subsection 4 provides for a multiplier of 2, 3, or 4 times (but not more than 4). I disagree that such a multiplier is appropriate here, given the issues and complexity, and the Trustee's role in making them so.

[25] Huphman claims solicitor-client costs.

[26] Not since Socrates sought punishment by free meals at the Prytaneum has a Court faced such chutzpah.

[27] I have recounted already the last-minute peekaboo interjection by counsel, to the inconvenience of all involved and the waste of both private and institutional resources.

[28] It is not before the Court (nor would privilege countenance the Court knowing) as to when they sought to engage counsel; certainly they knew of the

issue for months if not years. If they sat on their hands until the eve of trial, that is not to be sanctioned. If they engaged counsel early only to have a late disclosure of that retainer by counsel, followed by "and I'm closing tomorrow for two weeks," that is far worse.

[29] I give counsel the benefit of the doubt to the extent of assuming that that he was engaged contemporaneously with his initial communication with the Court. However, that does not change the fact that he knew of the trial dates and how they did not mesh with his own scheduling or availability. If he was unable or unwilling to change his schedule, he had a duty to decline the file, or to arrange for a locum to attend to it in his absence. Failure to do so is a discourtesy to the parties, their counsel, and to the Court. I allowed the intervention of the Huphmans, notwithstanding this and counsel's objections, in the interests of justice to the Huphmans – but I said then, and repeat now, that doing so was subject to the issue of Costs.

[30] There is no request for costs against Mr. Romney personally. Had there been such a request, I would have considered it on such evidence as may have been properly admissible.

[31] I add that notwithstanding my comments as to the marginal relevance (or irrelevance) of parts of the Delaney affidavit, counsel exacerbated these proceedings with a frivolous application to strike it in its entirety. On its own, such an application (made without prior notice) would be bad enough.

[32] But it did not stop there. Mr. Huphman, having sworn a joint affidavit with Mrs. Huphman, sought to avoid cross-examination based on a short doctor's note, again without notice (or the doctor's presence) – see paragraphs 70-72 of the 2019 decision. Ultimately, although Mr. Huphman had obvious limitations, there was no basis in fact or law for such a "have cake and eat it too" application.

[33] Both were litigation by ambush. They were a waste of time.

[34] I also add this: counsel for the Huphmans cites in his brief several cases dealing with high-handed or capricious conduct. One such case, quoted at length, is that of *Smith's Field Manor v. Campbell*, 2001 NSSC 44. That involved litigation of Dickensian length and Kafkaesque qualities, generally without merit. This case does not come close, although as with that and other system-clogging cases, the waste of resources is inimical to the interests of justice. Here, the waste of resources in late 2018 and lost trial dates is entirely that of the Huphmans and/or their counsel and while nothing like that encountered in *Smith*, does have the

common element of counsel who disregards the strained resources that are thrown away in consequence.

[35] In considering all of the foregoing factors, the briefs of the parties, the *BIA* commentary on costs (as ably cited and repeated in Delaney's brief), and the various actions of the parties, I have decided that the most efficient and just disposition of this case is an award of net lump sum costs. As noted, I have that jurisdiction both under s. 197(2) *BIA* and Rule 77.08.

[36] I have also considered the argument that the Huphmans are of limited means (but have the benefit of the work performed), and the various claims that acts and omissions by one party that call for costs sanctions should be offset against any entitlement of another party to costs because of their vindication or right to have their position heard.

Conclusion

[37] Accordingly, and in exercise of my discretion, I direct that Delaney pay the Trustee the lump sum costs of $5,000, inclusive of tax and disbursements. The Huphmans shall bear their own costs.

[38] The Trustee shall prepare the associated order.