SUPREME COURT OF NOVA SCOTIA

Citation: *McCoul v Salty Rose Beach Houses Limited*, 2020 NSSC 146

Date: 20200420
Docket: Ken No. 446463
Registry: Kentville

Between:

Joanne Carole McCoul

Plaintiff

v.

Salty Rose Beach Houses Limited

Defendant

Judge:	The Honourable Justice John A. Keith
Heard:	December 16, 2019, in Halifax, Nova Scotia
Final Written Submissions:	December 12, 2019
Counsel:	Michael Dull, counsel for the Plaintiff Joanne Carole McCoul Gregory Hardy, counsel for the Defendant Salty Rose Beach Houses Limited

By the Court:

INTRODUCTION AND ISSUE

[1] During a Date Assignment Conference conducted on August 16, 2018, the trial in this action was scheduled for January 13 to 17, continuing January 20, 2020. The Finish Date was October 11, 2019. In addition, the parties agreed to participate in a Judicial Settlement Conference scheduled for November 28, 2019 – less than 2 months before trial.

[2] On December 16, 2019, I heard a motion by the Plaintiff to adjourn the trial. The motion became necessary because the Plaintiff's solicitor of record, Debbie Bowes, was retiring from the practice of law at the end of January, 2020 and the Plaintiff had just engaged new counsel, Michael Dull.

[3] The details surrounding Mr. Dull's engagement and Ms. Bowes' planned retirement are addressed in greater detail below. For present purposes, suffice it to say that Ms. Bowes placed great faith in her ability to resolve the matter at a judicial settlement conference scheduled for November 28, 2019. She was caught off-guard when, on November 20, 2019, counsel for the Defendant, Mr. Greg Hardy, cancelled the settlement conference and confirmed his instructions to proceed to trial. Now faced with a trial starting in less that two months, Ms. Bowes was forced into a last-minute decision: conduct the trial herself as counsel of record or initiate an emergency effort to find new counsel. She chose the latter and began to seek new counsel to assume carriage of the file on the Plaintiff's behalf.

[4] On November 27, 2019, well after the Finish Date and less than two months before trial, Ms. Bowes approached Michael Dull. Mr. Dull agreed to accept the retainer but confirmed that he would be unable to proceed on the scheduled dates due to existing trial commitments.

[5] The Defendant agreed that the trial would have to be adjourned, in the circumstances. However, the Defendant sought costs, including costs against Ms. Bowes personally.

[6] Given the Defendant's position, the sole issue for determination by me involved the costs consequences associated with a belated adjournment request.

FACTS

[7] On December 16, 2015, the Plaintiff filed a Notice of Action and Statement of Claim alleging that the Defendant was negligent in its failure to keep steps for a rented cottage reasonably free from ice buildup. She alleges that this negligence caused her to fall on the stairs and resulted in her suffering injuries and losses. Ms. Bowes was named the Plaintiff's solicitor of record from the commencement of proceedings.

[8] The Defendant filed a Statement of Defence on January 5, 2016. Defendant's solicitor of record was Gregory Hardy.

[9] Between April and June, 2018, the parties discussed settlement but did not resolve their differences.

[10] The Defendant filed a Request for Date Assignment Conference. On August 16, 2018, Justice Warner presided over the Date Assignment Conference. Trial dates were set for January 13 to 17, 2020 and then one final day on January 20, 2020. With all counsel present, Justice Warner also established a Finish Date of October 11, 2019. At that time, the parties also agreed to a judicial settlement conference on November 28, 2019.

[11] Settlement negotiations resumed in April – May, 2019 but again failed to achieve resolution.

[12] The Finish Date was October 11, 2019, as indicated. As of that date, and in accordance with the Rules, counsel had exchanged their respective witness lists. Nobody expressed concern that the trial dates were at risk.

[13] As indicated, the parties agreed to a settlement conference scheduled for November 28, 2019. Justice Chipman was assigned to mediate the dispute.

[14] On November 20, 2019, counsel for the Defendant, Gregory Hardy, wrote to Chipman, J cancelling the settlement conference and confirming that his instructions were to simply proceed to trial.

[15] Later that same day, counsel for the Plaintiff, Ms. Bowes, wrote to Justice Chipman expressing surprise at the cancellation. In an affidavit sworn December 6, 2019, Ms. Bowes said she was shocked as this had never happened to her before. In her letter to Justice Chipman, Ms. Bowes also confirmed that she "will be retiring at the end of January, 2020" and, as such, the Plaintiff would need to retain new counsel. She also expected new counsel would require a Pre-Trial Conference.

[16] About one week later, on November 27, 2019, Ms. Bowes approached Mr. Dull to assume carriage of the file. Ms. Bowes told Mr. Dull that she planned to retire at the end of January, 2020 and could not represent the Plaintiff in the upcoming trial. Mr. Dull agreed to accept the new retainer but made it clear that he required an adjournment due to existing trial commitments.

[17] On November 28, 2019 Ms. Bowes wrote to me stating that she would be retiring "at the end of the year" - not the end of January, 2020 as mentioned to Chipman, J the day before. Her affidavit sworn December 6, 2019 offers some insight into these shifting deadlines. Ms. Bowes describes January 30, 2020 as the "absolute end date of practising" but explained that the month of January, 2020 was reserved for "'clean up' matters only". In short and as best I can tell, Ms. Bowes would outwardly suggest closing her practice as at the end of December, 2019 while inwardly reserving time in January, 2020 to tie up any loose ends.

[18] Pausing here, there are related questions which merit some attention: Why did Ms. Bowes wait until the end of November, 2019 (about 6 weeks prior to trial) to consider the possibility of alternate counsel? Why did she not either commit to completing the trial herself or take steps at an early date to ensure alternate counsel would be available to preserve these trial dates?

[19] Ms. Bowes' affidavit sworn December 6, 2019 provides some insight. She says that: "I had instructions from my client and I was confident that this matter would be resolved at the Settlement Conference." She describes her experience with judicial settlement conferences as "reasonably positive" – even though all negotiations in respect of this particular file had, at least up until November, 2019, failed.

[20] Her faith in the prospects of settlement proved to be misplaced. The judicial settlement conference was cancelled. Perhaps more unfortunate, Ms. Bowes did not have a fully developed back-up plan in place. To worsen the problem, Ms. Bowes decided that she could not complete the trial herself. In her December 6, 2019 affidavit, Ms. Bowes explains that:

> …when my support staff were advised of our firm's anticipated closure, they both found jobs quickly and this together with the increased challenges in winding up and/or transferring files has proven to be chaotic as expected, making a lengthy trial unrealistic and unfair to a client. I anticipated this and thus was reserving January for "clean up" matters only.

[21] In an earlier letter to me dated November 28, 2019, Ms. Bowes elaborated on this issue by acknowledging that she "grossly underestimated the work needed to close a practice."

[22] Also, in her affidavit sworn December 6, 2019, Ms. Bowes implies (but is not clear) that the decision not to involve new counsel was partly the Plaintiff's decision. As indicated, she obliquely mentions having "instructions" and later states: "My client was hopeful of an outcome [i.e. settlement] and certainly was not interested in changing long time Counsel (since February 2014) in advance of the Settlement Conference."

[23] I do not have any evidence from the Plaintiff herself. Given the ambiguities in Ms. Bowes' evidence and in all the circumstances, I am not prepared to infer that the Plaintiff accepted the risks associated with not have a trial plan in place and instructed Ms. Bowes accordingly. I return to this issue below.

[24] Mr. Dull filed his Notice of New Counsel on December 3, 2019. On December 6, 2016, he filed motion materials seeking to adjourn the trial.

[25] There is one final, factual issue regarding Mr. Hardy's knowledge of Ms. Bowes' planned retirement. Both Mr. Hardy and Ms. Bowes agree that the topic of Ms. Bowes' retirement was raised during settlement negotiations which occurred in April – May, 2019 (see para 11 above). However, there is a significant disagreement around whether Ms. Bowes disclosed anything beyond an intention to retire in the foreseeable future. This is relevant to the Defendant's claim for costs as Ms. Bowes' evidence suggests that Mr. Hardy would have known about (and should not have been surprised or prejudiced by) Ms. Bowes' retirement, the appointment of new counsel or the need for an adjournment.

[26] In her December 6, 2019 affidavit, Ms. Bowes refers to a telephone call where she told Mr. Hardy that if the matter did not settle, she would need to engage new counsel as she "would be retiring at the end of the year". Later in the same affidavit, she further recalling saying to Mr. Hardy that she "would have to find new counsel if this file was not resolved by the end of the year". She believes that this call with Mr. Hardy occurred following the only settlement offer received from the Defendant, which would have been around April 15, 2019 based on the evidence.

[27] In her letter to me dated November 28, 2019, Ms. Bowes wrote: "Several months ago I advised Mr. Hardy of my retirement. Mr. Hardy was aware that cancelling the Settlement Conference would require [the Plaintiff] to find another

lawyer." Ms. Bowes made similar representations in her letter to Chipman, J on November 20, 2019 – immediately after Mr. Hardy cancelled the settlement conference. She wrote: "I can advise that Mr. Hardy was made aware several months ago that I would be retiring and thus knew that Ms. McCoul would be without counsel in the event of an unsuccessful settlement conference."

[28] Mr. Hardy concedes being advised by Ms. Bowes that she would be retiring from practice during a telephone call on April 9, 2019. However, he denies any communication from Ms. Bowes confirming her retirement date prior to receiving her November 20, 2019 letter to Chipman, J.

[29] I am faced with two conflicting versions of events. Having carefully considered the evidence, I accept Mr. Hardy's recollections on this particular issue for the following reasons:

1. In my view, where counsel's pending retirement places a scheduled trial at risk, the onus of ensuring that the circumstances surrounding their retirement are clearly communicated to opposing counsel remains on the retiring counsel. The counsel who is making retirement plans is in the best position to ensure clarity and minimize disruption to the legal process.

   Here, the evidence is clear that Ms. Bowes failed to effectively communicate many important details of her retirement – either in writing or otherwise. In the circumstances, it would be unfair and unreasonable to ask others to accept responsibility for the consequences of any miscommunication;

2. Related to this second point, I note that the Finish Date is a very important milestone in the lead-up to trial and, in particular, is the deadline for completing all pretrial procedures (Rule 4.16(6)(c)). Also, any attempt to adjourn after the Finish Date must be made to the trial judge directly – and trial adjournments after the Finish Date has passed are not granted lightly. As such and in terms of trial readiness, the Finish Date might be described as a procedural point of no return, absent extraordinary circumstances.

   In this case, Ms. Bowes continued to act in a manner consistent with trial counsel at least up to the Finish Date on October 11, 2019 (3 months before trial). For example, on October 11, 2019 Ms. Bowes filed her client's witness list in accordance with the Rules. The list filed by Ms. Bowes would be binding on the Plaintiff at trial subject only to certain exceptions set out in Rule 4.18(2). This is consistent with the actions of counsel prepared to proceed with the trial, if necessary. It is not consistent with the

actions of counsel who was retiring and not prepared to proceed to trial. Ms. Bowes' decision to remain as solicitor of record past the Finish Date significantly and irretrievably altered the Plaintiff's ability to subsequently seek an adjournment.

Again, in my view, this decision to remain as solicitor of record beyond the Finish Date without even introducing alternate counsel to the file may reasonably be interpreted as confirming a decision by Ms. Bowes to see this matter through until trial, regardless of future retirement plans.

DECISION ON COSTS

[30] The Defendants are entitled to costs in the circumstances.

[31] Nova Scotia's Rules of Civil Procedure specifically address some of the serious difficulties occasioned by adjournments on the eve of trial:

1. Rule 4.20(3) provides that a judge hearing a motion to adjourn after the Finish Date has passed *must* consider respective prejudices which will be visited upon the parties if trial dates are lost. The judge *must* also consider "the public interest in making the best use of court facilities, judges' time, and the time of court staff". The language of the Rule is mandatory and cannot be overridden by the exercise of a judge's general discretion (Rule 2.03(3))

2. Rule 4.20(4) stipulates the following two presumptions that a judge *must* make when considering a motion to adjourn a trial after the Finish Date:

    i. losing trial dates adversely affects a party's tangible and intangible interests;

    ii. a late adjournment adversely affects the efficient scheduling of facilities

    Again, the language of the Rule is mandatory.

[32] Here, the actions of the Plaintiff resulted in significant prejudice and caused the Defendant to incur unnecessary costs.

[33] The Defendant seeks the sum of $13,815 described as "throw away costs". That figure excludes the costs of final preparation for, and attendance at, this motion to adjourn. An affidavit sworn by the Defendant's counsel, Mr. Hardy,

describes the costs being claimed and the amount claimed purports to exclude any value which would not need to be duplicated in future trial preparation.

[34] In my view, that figure is excessive. $4,000 inclusive of costs associated with this motion to adjourn fairly and reasonably captures the purpose and intent of the Rules in the circumstances, properly reflects the risk of duplication and avoids any windfall. It also represents a substantial contribution to the Defendant's costs consistent with Rule 77.09. It greatly exceeds the typical cost award for a motion which, like this one, was not particularly complex and took less than a half-day of Court time.

[35] Finally, I note that the Defendant cancelled an agreed-upon settlement conference on November 20, 2019 - only 8 days before it was scheduled to proceed. That same day (November 20, 2019), the Defendant was told that Ms. Bowes was retiring in the near future and new counsel would have to be appointed. Thus, the Defendant would have been aware of the problem on the same day the settlement conference was cancelled. Any overlap between trial preparation and preparation for the upcoming settlement conference is not entirely clear. Regardless, I consider the belated cancellation of the settlement conference to be a mitigating factor when determining an appropriate amount for costs payable to the Defendant.

[36] This leaves the question as to who should be responsible to pay these costs: the Plaintiff personally or the Plaintiff's counsel, Ms. Bowes?

[37] The notion of the Plaintiff having to personally bear the burden of these costs is troubling even though, absent exceptional circumstances, she typically would be liable as the named party. There is no doubt that Ms. Bowes' planning around her retirement left much to be desired. In particular:

1. She knew that the judicial settlement conference was voluntary. She knew or certainly ought to have known that there was no guarantee the conference would result in a resolution of the dispute;

2. At the Date Assignment Conference, Ms. Bowes agreed to schedule the settlement conference *after* the Finish Date. Thus, she knew or ought to have known that if the settlement conference did not resolve the dispute (for whatever reason), the Plaintiff would have to proceed to trial in January, 2020 or face the serious consequences associated with a last-minute adjournment request. She deliberately courted that risk;

3. She decided to retire at the end of January, 2020 with no strategic thought given to the Plaintiff's trial obligations beyond misplaced confidence that the matter would be resolved at the settlement conference.

[38] Regrettably, the Plaintiff was left in a very tenuous and difficult position due to Ms. Bowes' retirement plans. In particular, Ms. Bowes put herself in a position where she became unwilling and unable to continue as the Plaintiff's solicitor of record. Indeed, Ms. Bowes found herself scrambling at the last minute to locate new counsel for her client.

[39] In these circumstances, should Ms. Bowes be personally liable for some or all of the costs payable to the Defendant?

[40] I begin by noting that costs payable to an opposing party by legal counsel personally triggers a different analysis than would apply in, for example, claims by a client in negligence against her own lawyer. The legal test and the applicable evidentiary burden are very different.

[41] Costs payable by a lawyer personally to an opposing party may be granted under either the Civil Procedure Rules (Rule 77.12) or the Court's inherent jurisdiction. There are doctrinal and practical differences between these two sources of the Court's authority to award costs against counsel personally. However, regardless of the underlying rationale, such awards are rare. The bar is high, and the remedy is approached by the Court with considerable caution. Among other things, legal counsel must be able to take sometimes unpopular or difficult steps on behalf of their clients without fearing reprisals in terms of costs levied against counsel personally (*Robinson* v *Gallagher Holdings Limited*, 2019 NSCA 97).

[42] It is not necessary to delve into this matter further because, after serious deliberation, I am ultimately not prepared to order that Ms. Bowes assume personal responsibility for costs otherwise payable by her former client (the Plaintiff) in the context of this particular proceeding. I note the following:

1. Ms. Bowes did not participate at the hearing of this motion and did not have the opportunity to offer any submissions independent of those presented by Mr. Dull on behalf of her former client, the Plaintiff. For that reason, ordering costs against Ms. Bowes personally may reasonably be criticized as procedurally unfair;

2. As indicated, Ms. Bowes made the statement in her affidavit that she "had instructions" from her client. She also described the Plaintiff as

> being "hopeful of an outcome [i.e. settlement]" and that the Plaintiff "certainly was not interested in changing long time Counsel (since February 2014) in advance of the Settlement Conference."
>
> The statements are all somewhat cryptic. No detail is provided including whether Ms. Bowes properly identified and explained the attendant risks to her client. Perhaps these gaps in the evidence arose out of a concern not to breach solicitor and client privilege, even though Ms. Bowes raised these issues in the first place and the Plaintiff filed them in support of her request for an adjournment. In any event, the Plaintiff did not file an affidavit responding to Ms. Bowes and providing her own version of events.
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> I repeat that these statements in Ms. Bowes' affidavit are not definitive; yet, they might imply that Ms. Bowes somehow discussed the risks of her strategy with the Plaintiff and that the Plaintiff made the informed choice to proceed – or, more specifically, that the Plaintiff must be taken to have accepted the risks (including costs) associated with putting existing trial dates in jeopardy after the Finish Date. I have concerns regarding any such inference in the circumstances and expressly confirm that I do not draw such an inference here. Nevertheless, the evidence is such that it would not be appropriate to find Ms. Bowes personally liable having regard to the onerous legal test.

[43] Should it prove necessary, there are other avenues where the Plaintiff and Ms. Bowes might address and determine any disputes as between themselves regarding the impact of Ms. Bowes' retirement on this action and the financial consequences for her client.

[44] The Plaintiff shall pay to the Defendant costs in the amount of $4,000. These amounts shall be payable at the conclusion of this action (not forthwith) and in any event of the cause.

Keith, J.