

SUPREME COURT OF NOVA SCOTIA

Citation: *CBRE Limited v. Ruby LLP*, 2020 NSSC 330

Date: 20201118

Docket: Hfx. No. 450233

Registry: Halifax

Between:

CBRE LIMITED

Plaintiff

v.

RUBY LLP

Defendant

Costs Decision

Judge: The Honourable Justice Robert W. Wright

Motion by October 29, 2020

Correspondence:

Written Decision: November 18, 2020

Counsel: Ibrahim Badawi for the Plaintiff

Peter Planetta for the Defendant

Wright, J.

[1] This is a decision on costs following the disposition of a motion made by the plaintiff under Civil Procedure Rule 10.04 for an order enforcing a settlement agreement reached by the parties on May 31, 2019.

[2] The procedural history of this proceeding begins with the commencement of an action by the plaintiff against the defendant on April 14, 2016 seeking damages for breach of contract pertaining to an unpaid real estate commission. After the completion of pre-trial procedures, the case was set down for trial on June 3, 2019.

[3] Three days prior to that date, the parties reached a settlement agreement on terms whereby the defendant was to pay to the plaintiff the sum of \$37,500 with a due date of June 30, 2019. The settlement also contained a term whereby Ruby was to sign a release containing a non-disclosure clause whereby the terms of the settlement were to be kept confidential from third parties.

[4] The defendant failed to meet the June 30th payment date but on July 4th, defence counsel informed plaintiff's counsel that the funds would be paid the next day. That didn't happen. Instead, defence counsel then sent a letter on July 5th taking exception to the wording of the non-disclosure clause in the release as being

one-sided. Plaintiff's counsel then made revisions to the release and sent it to defence counsel that same day, which did not satisfactorily address the defendant's concerns.

[5] As it turned out, that was the last that plaintiff's counsel would hear from the defendant for a full year.

[6] With its demands for the overdue payment being ignored, the plaintiff then filed a motion under Civil Procedure Rule 10.04 on October 10, 2019 for the enforcement of the settlement agreement. The motion also sought an order awarding the plaintiff the costs of this motion on a substantial indemnity basis. The motion was initially returnable on April 22, 2020 but because of the pandemic, it was ultimately rescheduled to August 14, 2020.

[7] In the meantime, plaintiff's counsel continued to press the defendant for payment but all of its demands continued to be ignored, with no response being made whatsoever.

[8] After the court became involved exploring the possibility of a virtual hearing, the plaintiff filed two affidavits and a brief on June 15, 2020 in support of its motion. That was followed by the first of two conference calls with counsel and the court on July 10, 2020 at which time defence counsel indicated that the motion

was going to be contested (although no grounds for doing so were specified).

Defence counsel was thereupon directed to file its response materials by July 30th, two weeks prior to the scheduled hearing date of August 14th.

[9] On the due date of July 30th for the filing of its response materials to the motion, defence counsel wrote to plaintiff's counsel, aspiring to dispense with the matter if the reciprocal waiver was signed and the settlement funds paid in full. That was followed the next day with a clear with prejudice offer to plaintiff's counsel on terms whereby the defendant would sign a consent order acknowledging that the settlement was binding, with the proviso that the order be held in abeyance until August 31st at which time the settlement funds would be paid. If not so paid, the plaintiff would then be in a position to take steps to enforce the order. There was no mention in this communication about the form of the release.

[10] Plaintiff's counsel replied to this offer on August 4th stating that his client was seeking a substantial contribution to costs which had been unnecessarily incurred in enforcing the agreement. The stipulation was made that unless the parties were able to agree on the costs to be paid to the plaintiff, which would have to be incorporated in the consent order for judgment, the plaintiff would stay the course and proceed to the hearing of the motion on August 14th. Defence counsel

was not amenable to that stipulation on costs on the premise that an actual hearing would not have to be proceeded with.

[11] It was on August 11th that a second conference call was convened with the court at the behest of defence counsel. During that conference call, defence counsel advised the court that the motion was not going to be contested but that there was still the outstanding issue of costs of the motion. The court then gave direction to counsel that a consent order for judgment be prepared for the amount of the debt and that they subsequently attempt to agree on an amount of costs, failing which the court would decide the issue of costs as a motion by correspondence. The actual hearing scheduled for August 14th thereby became unnecessary.

[12] Ten days later, on August 21st, and with no agreement having been reached on costs, the court issued an order for judgment in favour of the plaintiff in the amount of \$37,500 to be paid forthwith, with a further direction that costs of the motion be determined by further order of the court. We have now reached that juncture after the filing of written submissions by both counsel. As an aside, at the time of those filings, the settlement funds still had not yet been paid.

[13] The position of plaintiff's counsel is that the Tariff C amount payable following a motion in Chambers (here in a range of \$750-\$1,000) is woefully inadequate when measured against the aggregate amount of the invoices rendered to the client which total \$10,123.90 inclusive of disbursements and HST. Counsel emphasizes that none of the costs incurred by the plaintiff on this motion would have been incurred but for the defendant's inexcusable unresponsiveness, and its attempt to simply walk away from the settlement agreement. Plaintiff's counsel therefore urges the court to make a costs award that would adequately serve the principle of a substantial but incomplete indemnity. Relying on the well-known cases of **Bevis v. CTV Inc.**, 2004 NSSC 209 and **Williamson v. Williams et al.**, 1998 NSCA 195, plaintiff's counsel submits that a just and appropriate costs award that should be made is 60% of the total amount billed to the client, which works out to the sum of \$6,074.34.

[14] Counsel for the defendant, on the other hand, maintains that where this was not a complex matter and where no actual hearing needed to be held, the appropriate costs award should fall below the Tariff C range aforesaid and be pegged at \$500.

[15] As affirmed in **Bevis** amongst other cases, and indeed as embodied in Civil Procedure Rule 77.06(3), costs are normally set in accordance with the applicable

tariff. However, subparagraph (3) of Tariff C also provides that in the exercise of discretion to award costs following an application (or a motion per Civil Procedure Rule 77.05), a judge presiding in Chambers, notwithstanding Tariff C, may award costs that are just and appropriate in the circumstances. Beyond that, Civil Procedure Rule 77.08 provides that a judge may award lump sum costs instead of tariff costs.

[16] The issue now to be decided is whether the court should exercise its discretion to make a lump sum award of costs, notwithstanding Tariff C, that would produce a just and appropriate award in the circumstances of this motion.

[17] I have been referred by defence counsel to three earlier decisions of this court where a successful motion was made under Civil Procedure Rule 10.04 after a full hearing on the evidence. They are respectively cited as **Certified Design Consulting Inc. v. Alex Lane Properties Inc.**, [2015] NSJ No. 559, **Langthorne v. Humphreys**, [2011] NSJ No. 60 and **Tsabos v. Lewis**, [2013] NSJ No. 63. In each of those cases, the successful applicant was awarded costs within the Tariff C range of \$750-\$1,000.

[18] I have not been referred to any case precedent involving a Civil Procedure Rule 10.04 motion in which the Tariff C range of costs was departed from.

[19] Counsel for the plaintiff concedes that this matter was neither complex nor novel and that it was a straightforward matter that ultimately went uncontested. However, the plaintiff seeks an award of lump sum costs, based on the principle of a substantial but incomplete indemnity, on the grounds that the defendant waited until two days before the scheduled hearing, putting CBRE to great expense in the process, before finally acknowledging that it had entered into a binding settlement. The plaintiff further submits that none of the costs incurred by CBRE on the motion would have been incurred but for the defendant's inexcusable unresponsiveness and its attempt to simply walk away from the agreement until the intervention of the court forced its hand. Plaintiff's counsel takes the position that the defendant's delay and unresponsiveness, for more than a year, was unjustified and inexcusable and ought to draw the sanction of this court in its award of costs.

[20] In support of its position, plaintiff's counsel has filed an affidavit, attaching as exhibits redacted copies of the eight invoices sent to the client covering work performed during the period from July 16, 2019 to July 31, 2020. The aggregate total of these invoices is \$10,123.90 comprised of legal fees of \$8,746, disbursements of \$66.00 and HST of \$1,311.90.

[21] The first two of these invoices provides only the name of the timekeeper (Mr. Badawi) and the amount of the bill. The remaining six invoices also set out the number of hours spent each time an entry was made and the hourly rate charged. All of the time entries describing the services performed have been redacted in all of the invoices.

[22] In the extrapolation of this information, it appears that counsel for the plaintiff expended close to 35 hours on this motion which were billed to the client. However, in the absence of any description of any of the legal services performed over that one year period, the court is not in a position to fully measure the reasonableness of counsel's legal accounts on an objective basis. It is abundantly clear, however, that CBRE was put to significant legal expense by reason of the defendant's delay and unresponsiveness spanning that one year period.

[23] The court is not privy, of course, to the strategic communications between defence counsel and his client and no reasons have been provided to the court to explain the defence delay and unresponsiveness. I infer therefore that this was simply a tactical delay to run out the string as long as possible. What is more egregious, however, is the defendant's abject failure to respond to the repeated communications by plaintiff's counsel over that one year period and forcing the plaintiff to gear up for a hearing, only to fold at the eleventh hour to avert it, with

another empty promise to pay the settlement amount by a date certain. That conduct should now sound in costs to be awarded on this motion.

[24] While I am not satisfied that I have enough information to objectively measure the reasonableness of the plaintiff's legal accounts so as to base an award of costs on the principle of substantial but incomplete indemnity, I readily conclude that this is a proper case in which a lump sum award of costs should be made in departure from Tariff C. All things considered, I award costs in favour of the plaintiff in the amount of \$3,500 as a just and appropriate amount in the circumstances of this motion.

J.