SUPREME COURT OF NOVA SCOTIA

Citation: *Layes v. Layes*, 2021 NSSC 248

Date: 2021-08-16
Docket: Hfx. No. 434899
Registry: Halifax

Between:

Rose Ellen Layes

Plaintiff /
Defendant by Counterclaim

v.

Kevin Layes and **3086779 Nova Scotia Limited**

Defendant/
Plaintiff by Counterclaim

Judge:	The Honourable Justice Gregory M. Warner
Written Submissions:	July 5 and 27; August 5, 2021
Counsel:	Peter Rumscheidt, for the Plaintiff / Defendant by Counterclaim Ron Pizzo, for the Defendant/Plaintiff by Counterclaim

By the Court:

[1] This cost decision relates to the decision reported as 2021 NSSC 176.

[2] The plaintiff, Rose Layes was entirely successful in her claim that Kevin Layes received the benefit of and promised to pay and indemnify her and her late husband from a mortgage they placed on their homestead property for him, and in defending the counterclaim by Kevin Layes' corporate defendant for foreclosure of that mortgage in the amount of approximately $350,000, and Kevin Layes' personal claim for about $80,000 plus interest based on unjust enrichment in relation to his payment for seven of the eight wells drilled by WR Graham Services Limited on the Layes' property.

Plaintiff's submission

[3] The plaintiff asked the court to apply the principle that a costs award should provide a substantial contribution to the successful party's reasonable legal fees and expenses.

[4] She submits that the starting point is the application of Tariff A In Rule 77. The first step in determining the tariff is determination of the "amount involved". The defendants quantified the amount involved in the plaintiff's claim for indemnity in the corporate defendant's counterclaim for foreclosure of the mortgage : $350,805.87 as of March 4th 2020. Kevin layes unsuccessful counterclaim for unjust enrichment was quantified by him at $80,000 plus simple interest at 5% per annum from July 15th 2010 or about $40,000.

[5] The Plaintiff says that the amount involved is about $470,000. Applying the basic scale (Scale 2), costs would be $34,750 plus $2000 per day for eight days of trial for a total of $50,750, plus disbursements of $4362.

[6] The Plaintiff points out that the action began in 2014; it involved numerous discovery examinations, extensive document production and many pre-trial motions and appearance days.

[7] The plaintiff produced detailed invoices for legal services since 2014. Fees total $112,146.89, and disbursements total $4362.54.

[8] Tariff A costs represent about 45% of the plaintiff's actual legal costs.

[9] The plaintiff acknowledges that the departure from tariff costs is not normal but claims that her actual costs are reasonable in the circumstances as found in this court's trial decision. She seeks lump sum costs of $80,000 plus disbursements of $4350, or about 72% of her actual legal costs.

Defendants submissions

[10] The defendants submit that the main issue, which consumed substantially all of the trial's time was the Plaintiff's claim that she had a collateral agreement with Kevin Layes whereby she and her late husband would mortgage their property and he would be responsible to pay the mortgage debt. She sued to enforce Kevin's promise and for a release of the mortgage. The defendants claim that the Plaintiff's claim is a non-monetary claim.

[11] The defendants submit that the counterclaims for unjust enrichment and foreclosure of the mortgage consumed a "very small" amount of the court's time , and besides, the court never provisionally quantified the corporate defendant's foreclosure claim. Citing *Lubin v Lubin*, 2012 NSSC 93 at paragraph 3, and similar trial decisions, the defendants submit that the "amount involved" should be assessed by using the eight trial days and the rule of thumb of $20,000 per day of trial, or $160,000.

[12] Tariff A would result in a costs award of between $16,750 (scale 2) and $20,938 (scale three), plus $16,000 for eight trial days , for a total of between $32,750 and $46,938, plus disbursements. They say that the appropriate award is $32,750 plus disbursements, or $37,112.54.

[13] They contest the plaintiff's claim for a lump sum award pursuant to rule 77.08. They submit:

(a) None of the factors in Rule 77.07(2) apply. The real reason for claiming a lump sum award is to punish the defendants based on the findings of credibility against Kevin Layes. Punishing for bad faith conduct requires a very high bar of misconduct and that does not exist in this case.

(b) Plaintiff's actual fees would have been less but for the requirement that the parties file post trial briefs; they were necessitated by the lengthy breaks during the plaintiff's cross examination.

(c) If a lump sum is awarded to provide a substantial contribution to the plaintiff's costs, a reasonable contribution would be $50,000 plus the actual disbursements.

Reply Brief

[14] Ms. Layes submits that her claim was monetary, and inextricably linked to the corporate defendant's foreclosure counterclaim, which the defendants quantified at about $350,000. This, and Kevin Layes' unjust enrichment claim of about $120,000., were the amounts at risk and the appropriate basis for applying Tariff A.

[15] She submits that Mr. Layes' conduct of the proceedings can be the basis for a lump sum award, the prospect of an unsuccessful litigant having to pay costs is a proper deterrent for unmeritorious claims. This is the basis for her claim for a substantial contribution to her costs.

Analysis

[16] Rule 77.02 gives the court discretion to award costs that will do justice between the parties . The discretion is not unlimited. The starting point is Tariff A. The first step in Tariff A analysis is to determine the "amount involved". Rule 77 sets out explicit guidance on the four ways that the amount involved can be determined.

[17] The defendants state that the plaintiff's claim, which they describe as the main issue, was a non monetary issue. If so, the court's analysis would follow part three of that guidance – the factors being the complexity of the case and importance to the parties.

[18] Characterizing the plaintiffs claim for a release of mortgage on the basis of Kevin Layes' agreement to be responsible for the mortgage as a non-monetary issue makes no sense. The Action was about the debt obligation secured by the

mortgage. The counterclaim for foreclosure of that mortgage in the amount of approximately $350,000 quantified the amount involved. The Plaintiff's claim and corporate defendant's counterclaim are the same issue. The corporate defendant was unsuccessful in its claim for foreclosure of a claimed debt obligation of about $350,000. The plaintiff's issue and the corporate defendants issue are simply two sides of the same coin. They are both monetary claims.

[19] The amount involved in this case in respect of both the plaintiff's successful claim and the corporate defendant's unsuccessful claim for foreclosure is $350,000, the amount claimed by the defendant.

[20] The amount involved in Kevin Layes' unsuccessful unjust enrichment claim is the amount claimed of $80,000 plus interest for 10 years, or about $120,000.

[21] Whether one reads the definition of "amount involved" as the amount claimed in this case unsuccessfully by the defendants and successfully by the plaintiff , it is just that the amount involved in this case is the amount which was at risk in the amount of approximately $470,000. I so find.

[22] This proceeding became complex, not just because of the extensive pre-trial proceedings, but by reason of the collateral issues raised by the defendants at trial which necessitated a lengthy decision. The abuse of process defence related to the Graham proceeding, and the complications that arose by reason of the Defendants filing a Third Party claim against their lawyer, but incredibly, not contesting the lawyer's motion to dismiss the Third Party claim was strange and improper. They added complexity and expense to the proceeding. The defendant's conduct in respect of these two collateral issues affected the complexity, speed and expense of the proceeding, and the trial itself.

[23] As noted above, the starting point is the application of Tariff A. If the court applies tariff A to an amount involved of $470,000, it produces a costs award per scale 2 of $34,750 plus $16,000 for eight trial days plus disbursements, or if per scale 3 of $43,438 plus $16,000 for eight days trial plus disbursements. Applying scale 3 results in a gross award of $63,800 inclusive of the plaintiff's legal disbursements.

[24] Rule 77.07 permits the court to increase or decrease the tariff amount. Rule 77.07(2) gives examples of relevant factors. The examples are not an exhaustive list. The two collateral issues referred to above, and the conduct of the defendants added to the expense and speed of the proceedings. They justify the application of

the principle that the successful party should receive a substantial contribution towards her legal costs. I am satisfied that the Plaintiff counsel's invoices are reasonable costs.

[25] Tariff A fees would, in all the circumstances, be insufficient to do justice between the parties. Increased fees are awarded in accord with Rule 77.07.

[26] The parties did not brief the court as to a division of the costs between the defendants. The defendants defended the Action jointly, even though they pursued separate counterclaims. The first defendant controlled the second defendant. It is appropriate and ordered that the defendants be jointly and severally liable for the plaintiff's costs.

[27] The Plaintiff is awarded increased tariff fees and actual disbursements in the total amount of $70,000.00, payable forthwith.

Warner, J.