SUPREME COURT OF NOVA SCOTIA

Citation: *Coggins v. LeBlanc*, 2022 NSSC 78

Date: 20220315
Docket: *Digby*, No. 476766
Registry: Digby

Between:

Suzanne Coggins

Plaintiff

v.

Regine LeBlanc

Defendant

and

Gerard Pothier

Third Party

Judge:	The Honourable Justice Pierre L. Muise
Heard:	By Correspondence
Final Written Submissions:	January 12, 2022
Counsel:	Robert H. Pineo, for the Plaintiff Hugh E. Robichaud, for the Defendant Gerard Pothier– not participating in costs Motion

COSTS FOLLOWING PLAINTIFF'S SUCCESSFUL SUMMARY JUDGMENT MOTION

[1] On September 15, 2021 I granted Suzanne's Coggins' motion for summary judgment on the evidence. She and Regine LeBlanc were unable to reach agreement on the issue of costs.

[2] Ms. Coggins seeks lump sum costs in the amount of $15,675, plus disbursements, and advances the following reasons:

1. The motion disposed of the entire proceeding, except for assessment of damages.
2. Following discovery examinations, Ms. LeBlanc added a third party, increasing Ms. Coggins' legal expenses. She ought to have known, at that point, that Ms. Coggins would succeed in her claim.
3. Ms. LeBlanc continued with an untenable defence and no facts to support the defence.
4. There is no "amount involved" as the case is about ownership of land.
5. Ms. Coggins incurred legal expenses of $20,898.96, inclusive of HST.

6. The maximum Tariff C award, given that the hearing took less than one-half day, is only $4,000, and does not provide substantial contribution.

7. Substantial contribution would amount to 75% of solicitor-client costs (ie. $15,675).

8. Adding $2,884.16 in disbursements (inclusive of HST) to that amount provides the total $18,560 requested.

[3] In support, she relies on the *Civil Procedure Rules* and the following jurisprudence:

- **Armoyan v. Armoyan**, 2013 NSCA 136
- **Fougere v. Blunden Construction Ltd**., 2013 NSSC 412
- **Grue v. McLellan**, 2018 NSSC 151 (for its summary of **Armoyan**)
- **Laamanen v. Cleary**, 2017 NSSC 153

[4] I will comment on **Armoyan** later.

[5] She argues that **Fougere v. Blunden**, where lump sum costs were ordered, supports the same result in the case at hand because of the similarity of factors considered. However, there are numerous distinguishing features which indicate otherwise. They include the following:

- **Fougere v. Blunden** involved a third party summary judgment motion and the costs of the action were not a consideration.
- The case was about professional negligence and expert evidence of industry standard formed part of the motion.
- Issues such as the roles of the contractor and the architect, and the interpretation of construction contracts, added to the complexity of the motion.

[6] The case at hand was much less complex. It involves a successful plaintiff summary judgment motion. Ms. Coggins is seeking substantial contribution towards all costs of the proceeding.

[7] Ms. Coggins advances **Laamanen v. Cleary** as supporting her request that I award her 75% of her actual legal costs as a substantial contribution towards them. However, unlike the case hand, in that case: full legal account details and supporting documentation, including entries, hourly rates and the work conducted, were provided, and permitted the Court to determine the actual expenses were reasonable; and, the unsuccessful party had rejected a settlement offer, a factor which justifies augmenting the costs award. Therefore, **Laamanen v. Cleary** does not support Ms. Coggins' request.

[8] Ms. LeBlanc submits that Ms. Coggins is entitled to Tariff C costs in the range of $1,500 to $2,000, plus disbursements to be taxed, and advances the following reasons:

1. The hearing took more than one hour but less than one-half day, providing a basic Tariff C range of $750 to $1,000.

2. A multiplier of two should be applied because, though the matter was important to the parties, it was not complicated and the "effort involved in preparing for and conducting the application was not overly burdensome", there having been only one brief affidavit from Ms. Coggins and no cross-examination of any party.

[9] In support, she relies on the Civil Procedure Rules and the following jurisprudence:

- **4187440 Canada Inc. v. Physio Clinic Ltd. (c.o.b. Physio Clinic and Woodlawn Physio Clinic),** 2014 NSSC 214
- **Agate Developments Ltd. v. United Gulf Developments Ltd.**, 2008 NSSC 144
- **Bank of Montreal v. Scotia Capital Inc.**, 2002 NSSC 274
- **Fitzgerald v. Brogan**, 2010 NSSC 335

[10] In these cases, costs ranging from $1,000 to $2,000 were awarded.

[11] **Agate Developments Ltd. v. United Gulf Developments Ltd.** does not assist in determining costs in the case at hand because: no reasons were provided for the costs award; the application was only for partial summary judgment; and, the application was only allowed in part.

[12] **Bank of Montreal v. Scotia Capital Inc.** does not support the approach argued by Ms. LeBlanc as the Court did not consider the use of any of the Tariffs to be appropriate. Since the decision is 20 years old, it does not support the quantum advanced by Ms. LeBlanc either.

[13] **4187440 Canada Inc. v. Physio Clinic Ltd.** involved costs payable to self-represented parties, which requires a foregoing of remunerative activity, and the summary judgment decision only terminated the proceeding in relation to two defendants, leaving it to continue against the remaining defendants. Those distinguishing features render the case unhelpful.

[14] **Fitzgerald v. Brogan** supports the application of Tariff C in the case at hand, but it is unclear how important the proceeding was to the plaintiff and how much effort the defendants had to put into preparing for the motion, as the plaintiff was self-represented and it was found that she did not have standing, plus that the limitation period had expired. Therefore, it was not necessary to assess whether a trial on the merits would otherwise have been required.

[15] A court may grant a defendant, who has been successful on a motion to dismiss a plaintiff's claim, costs of the action, even though that defendant had already been awarded the costs of the motion: **Bishop v. Nova International Ltd.**, 2010 NSSC 418; and, **Binder v. Royal Bank**, 2003 NSSC 265. It is reasonable to

extend this same principle to plaintiffs who have been successful in summary judgment motions. That approach is endorsed in § 4:86 of Orkin and Schipper, *Orkin on the Law of Costs*, Second Edition (2019 – Thomson Reuters Canada, Toronto), where it stated:

> "A plaintiff who succeeded on a motion for summary judgment was entitled to the costs of the motion and of the action."

[16] Unless otherwise ordered, Tariff A applies in determining the party and party costs of an action: **Armoyan v. Armoyan**, 2013 NSCA 136; CPR 77.06.

[17] In this case, Ms. Coggins is seeking a substantial contribution towards actual legal fees. She submits that a just amount is 75% of the actual legal fees.

[18] She argues, based on **Armoyan**, that, to be meaningful, "the amount is to be in the 'two-thirds to three-quarters' range. I disagree with that reading of **Armoyan**.

[19] The Court in **Armoyan**, at paragraph 16, cited with approval a passage from *Williamson v. Williams*, 1998 NSCA 195, which noted that, "party and party costs between two-thirds and three-quarters of solicitor and client costs … might have seemed reasonable" but "[t]here has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in

cases not involving misconduct or other special circumstances". At paragraph 37, it indicated that a costs award exceeding 50% of reasonable legal expenses will represent a "substantial contribution" towards them. The acceptable percentage varies with the circumstances, increasing with litigation misconduct. In **Armoyan**, the Court determined that, because of litigation misconduct, a proper substantial contribution was 66% of the reasonable legal expenses, before the rejected settlement offer, and 80% thereafter. The litigation misconduct in that case was extreme.

[20] In addition, as noted at paragraph 16 of **Armoyan**, the contribution is to be towards the party's "reasonable expenses in presenting or defending the proceeding", not necessarily the actual expenses.

[21] In the case at hand, Ms. Coggins has presented accounts for legal services listing the actions taken and the total legal fees. They do not contain any hourly rates, breakdowns of time spent on the itemized actions, nor even the total time spent. Therefore, they are of limited assistance in determine whether the actual legal expenses are reasonable.

[22] Further the legal fees submitted include those incurred after the summary judgment motion to prepare submissions on costs. In my view, that portion is not properly included.

[23] Ms. Coggins' position that "there is no 'amount involved' upon which to base the application of the Tariff" because "this case was about title and ownership of land", is an unfortunate position. It resulted in no evidence or information being presented regarding the value of the land. That would have been a reasonable factor upon which to base the "amount involved".

[24] In these circumstances, as stated by the court in **Chater *et al* v. Canada Lands Company**, 2005 NSSC 120, I am left "with a judgment call as to what is a reasonable level of indemnity".

[25] The costs amount proposed by Ms. LeBlanc is inadequate. It completely ignores the costs of the action and downplays the amount of work that was expended by Ms. Coggins' lawyers for the summary judgment motion. The fees for that portion of the work represented what appears to be most of the work outlined in the accounts for legal services.

[26] The judgment call I am forced to make also leads me to conclude that even applying a multiplier of four to the maximum base Tariff C amount would not represent a substantial contribution, as $4,000 does not exceed 50% of what I estimate to be reasonable legal fees.

[27] However, since I may grant costs both of the summary judgment motion and the action, I may also turn to Tariff A, and assess, whether the addition of the Tariff A amount will provide such substantial contribution.

[28] Using an amount involved of less than $25,000 produces a Basic Scale amount of $4,000. The property may be worth more than that as it is a riverfront property. However, it would have been up to Ms. Coggins to provide evidence of value to establish such an amount involved. I cannot substitute a speculative value for such evidence.

[29] The outcome of the summary judgment motion obviated the need for a trial. Therefore, no "length of trial" amount is to be added. If a trial is required for assessment of damages, that element may factor in then.

[30] Even if a damages trial is required, it will not change the appropriateness of considering Tariff A in this costs assessment. That is because those damages will not include the value of the property, as Ms. Coggins has the property, and none of the work performed to date relates to damages.

[31] So, in the circumstances of this case, $4,000 is the appropriate Tariff A amount.

[32] I return now to Tariff C, and the appropriate multiplier to apply.

[33] I agree that the matter was not overly complex and that it was important to the parties. Though, the amount of effort involved in preparing for and conducting the motion was not overly burdensome, it was still significant for Ms. Coggins, and increased because of Ms. LeBlanc's approach to the motion.

[34] Ms. Coggins responded to Ms. LeBlanc's 15-page brief, with her own 17-page brief.

[35] There was no cross-examination of any party because Ms. LeBlanc did not file any affidavits and did not give notice of intention to cross-examine Ms. Coggins. The failure to give such notice provided an additional issue for the parties to address in supplementary briefs of one and two pages respectively. Then the point had to be argued at the beginning of the hearing.

[36] In addition, in her brief, Ms. LeBlanc made multiple factual assertions which were not in evidence. Ms. Coggins had to address those, adding unnecessarily to her expenses.

[37] Though Ms. Coggins' affidavit was only 3 pages and attached only 4 exhibits, it was a distillation of: information obtained through thorough inquiries into title and documented incidents of ownership or possession; and historical information dating

back to 1994. The gathering and analysis of that information would, more likely than not, have been time consuming.

[38] Considering these points, it is appropriate to apply a multiplier of 3 to the maximum basic Tariff C amount of $1,000, to arrive at a total Tariff C amount of $3,000.

[39] So, the combined Tariff C and Tariff A amounts is $7,000.

[40] Pursuant to CPR 77.07(2), I may "add an amount to, or subtract an amount from, tariff costs" based on, among other things, "conduct of a party affecting the speed or expense of the proceeding" and "a failure to admit something that should have been admitted"

[41] I have already noted conduct by Ms. LeBlanc which added to the expense of the proceeding.

[42] The lack of evidence from Ms. LeBlanc highlighted that she had no evidence to contradict that of Ms. Coggins. In addition, Ms. Coggins used Ms. LeBlanc's own discovery evidence in support of her case, including that neither Ms. LeBlanc, nor anyone on her behalf, had entered the property during the relevant time period, even though she drove by it often and saw the acts of possession. That highlights that she had no evidence to challenge the facts advanced by Ms. Coggins. Despite that, she

maintained that there was a genuine issue of material fact. She attempted to rely on her own pleadings, arguing they raise a genuine issue of material fact to be determined at trial. It was unreasonable for her to do so in this summary judgment motion on the evidence.

[43] That is one thing she failed to admit which should have been admitted. There are others.

[44] It was clear and undisputed that Ms. Coggins had colour of title, yet Ms. LeBlanc failed to admit that the principle of constructive possession applied.

[45] Ms. LeBlanc argued that the "discoverability" principle applied, despite clear direction from the Nova Scotia Court of Appeal that it did not. In doing so, she unreasonably failed to admit that the principle did not apply.

[46] Considering these factors, it is appropriate to add $1,000 to the Tariff C amount, resulting in a total Tariff C amount of $4,000 and a combined Tariff A and Tariff C amount of $8,000.

[47] For reasons already noted, Ms. Coggins has not established, and I am unable to infer, that her reasonable legal expenses are $16,000 or more. As such, the total Tariff amount of $8,000 exceeds 50% of reasonable legal expenses, and represents

a substantial contribution, unless a higher amount is warranted because of litigation misconduct or other special circumstances.

[48] Ms. Coggins argues that Ms. LeBlanc ought to have known, early in the proceeding, that she did not have a tenable defence, and ought to have withdrawn it instead of opposing the summary judgment motion. However, Ms. LeBlanc did raise an issue which, though it was very weak in the circumstances, was not completely frivolous. The issue was whether the acts of possession were sufficient to exclude all persons. In the case at hand, determining that issue, involved a consideration of the nature of the property and its boundaries. Therefore, it is not clear that Ms. LeBlanc ought to have known that her challenge to the summary judgment motion would fail.

[49] She ought to have known her defence was weak, and she acknowledged, in pre-motion correspondence from her lawyer to Ms. Coggins' lawyer, that Ms. Coggins may be successful in relation to a portion of the land. Yet, in that correspondence, she closed off resolution discussions and challenged Ms. Coggins to "go for it", suggesting she would be wasting her money.

[50] It is unfortunate she took that stance. However, it does not rise to the level of litigation misconduct or other special circumstance warranting an upwards variation of the substantial contribution percentage.

[51] For these reasons, I conclude that requiring Ms. LeBlanc to pay Ms. Coggins $8,000 in combined costs of the summary judgment motion and of the action (excluding the damage assessment portion) will do justice between the parties.

[52] "An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award": CPR 77.10(1).

[53] Ms. LeBlanc submits that the disbursements should be taxed. It is unnecessary to put the parties through that additional step. I will assess the reasonableness of the disbursements claimed based on the evidence provided.

[54] Ms. Coggins claims disbursements, inclusive of HST, totalling $2,884.16. However, I have calculated the total disbursements and associated HST noted on the legal accounts for this litigation. They total only $2,701.55. That total is comprised of amounts for: delivery; discovery costs; postage; government fees and certificates; law stamps; filing fees; travel; and, accommodations. The travel and accommodations appear to be for discoveries held in Yarmouth, with the room being rented at a hotel to conduct the discoveries. Plus, Ms. Coggins. According to the evidence at the hearing, resided in Halifax. For these reasons, the out-of-town lawyer rules would not render the travel expenses improper. I accept that they are all proper disbursements.

[55] The accounts for legal services also contain "other charges" for copying/printing and fax. The fax charges are not recoverable with a costs award. Practice Memorandum No. 10 provides guidance on what photocopying charges are recoverable. It states: "One half of the number posted to the client account" at "ten cents a page". Unfortunately, the legal accounts do not specify the number of copies, nor the price per copy. I have examined the documents filed and, applying a conservative estimate, conclude that $90, inclusive of HST, is recoverable as a reasonable disbursement for copies.

[56] Consequently, I settle the reasonable disbursements at $2,791.55.

[57] Based on the foregoing, Ms. LeBlanc shall forthwith pay Ms. Coggins, $8,000 in combined costs of the summary judgment motion and the action, plus $2,791.55 in disbursements, inclusive of HST.

[58] I ask Counsel for Ms. Coggins to prepare the order.

Pierre L. Muise, J.