SUPREME COURT OF NOVA SCOTIA

Citation: *Belmont Financial Services Incorporated v. Watters*, 2023 NSSC 19

Date: 20230119
Docket: Hfx No. 502005
Registry: Halifax

Between:

Belmont Financial Services Incorporated

Plaintiff

v.

James Watters

Defendant

COSTS DECISION

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Final submissions on costs:	December 21, 2022
Counsel:	Adam Downie and Folu Adesanya (Articled Clerk), for the Plaintiff Robert Pineo, for the Defendant

By the Court:

[1] Following the trial in this matter, I rendered my decision on October 17, 2022 (*Belmont Financial Services Incorporated v. Watters*, 2022 NSSC 292). In doing so, I determined that Mr. Watters was required to repay to the Plaintiff the sum of $42,348.92, which had been paid to him by the Plaintiff in error. I also disallowed Mr. Watters' Counterclaim for damages as a result of the emotional distress which he contended had been inflicted upon him.

[2] The parties have requested to be heard on prejudgment interest and costs. They appear to be in substantial agreement with respect to the former, but not upon the latter issue.

A. Prejudgement Interest

[3] The parties are in agreement that the rate of 5% (simple interest), as specified in Civil Procedure Rule 70.07, is applicable. They also appear to be in substantial agreement as to the interval during which such interest should accrue, beginning in May 2020 and ending on October 17, 2022, the date of the decision. The Plaintiff says that this amounts to $5,226.90, whereas the Defendant says that amounts to $5,117.16. The Plaintiff shall receive $5,171.00 by way of prejudgment interest, to be paid by the Defendant.

B. Costs

(i) The competing arguments

[4] Counsel for the Plaintiff makes reference to several factors which are said to be pertinent to an award of costs in the circumstances. His argument is premised upon the fact that the Plaintiff was the successful party, and that costs generally follow the event. He further notes that this was a trial of short duration, and that the issues were not complex. Importantly, he adverts to the existence of a Rule 77 offer, which was an Offer to Settle made in April 2022, in exchange for the payment by the Defendant of the sum of $38,500.00, and further notes that this ended up being $3,848.92 less than what Belmont was actually awarded following trial. Although this offer was made after the finish date, it was never withdrawn, and he argues that Rule 10.09(2)(d) allows the Plaintiff to request that the Tariff Cost award be augmented by an additional 25%, as a consequence.

[5] On the other hand, counsel for Mr. Watters cites Civil Procedure Rule 77.03(1) and reminds the Court that specific mention was made, in the decision, of the fact that the Defendant is of advanced age and suffers health infirmities that negatively impact upon his ability to earn an income. Counsel reminds the Court that it was the Plaintiff's own mistake which resulted in the Defendant being paid money to which he was not entitled, under circumstances where there was nothing to cause the Defendant to second-guess his (apparent) entitlement to same. For that reason, the argument continues, each side should bear their own costs.

(ii) Analysis

[6] I will first consider the significance of the formal Offer to Settle, the existence of which is not disputed. Those portions of Civil Procedure Rule 10.09 which are germane to this issue follow:

> 10.09(1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> > (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
> >
> > (b) the offer is not withdrawn or accepted;
> >
> > (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
>
> (2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
>
> > (a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
> >
> > (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
> >
> > (c) fifty percent, if the offer is made after setting down and before the finish date;
> >
> > (d) twenty-five percent, if the offer is made after the finish date.

[7] Clearly, the Plaintiff has obtained a "favourable judgment" within the meaning of Civil Procedure Rule 10.09(1). Belmont was awarded more money, after trial, than the sum for which it had been prepared to settle beforehand, even though the written offer was made after the finish date. Provision is made in 10.09(2)(d) for

such a contingency, but it is trite to observe that it is discretionary, like all other components of a cost award.

[8] The lateness of the formal offer having been made, in some respects, strengthens the Plaintiff's argument. Since it was made after the finish date, it was made at a time when transcripts of discovery examinations and the fruits of document disclosure had long since been available for consideration by the parties.

[9] At trial, the Defendant attempted to argue that he had sustained a change in his position based on the mistaken payment received from Belmont, and that it would be inequitable, or against conscience, if he were required to repay it at this time. As I noted in the trial decision:

> 46. It is clear upon the basis of the foregoing authorities that the mere fact that the recipient, in this case Mr. Watters, has spent the funds paid to him in error does not constitute a change in position, or an equitable basis upon which to deny the Plaintiff the relief sought. The only purported foundation for such a defence has been argued to be the garage outbuilding which the Defendant erected in 2018, a little over two years after he began receiving funds from the Plaintiff.
>
> 47. However, the Defendant's clear (and candid) testimony was that this garage was erected using funds that he and his wife had saved over the years. Mr. Watters' own testimony was that they likely would have constructed the building in any event, regardless of whether he had received the funds erroneously paid by the Plaintiff, or not. I accepted that evidence.

[10] With respect, the strength of the Plaintiff's claim, and that Mr. Watters had no basis upon which to sustain his claim for the equitable relief that he requested at trial, are all facts of which the Defendant was either aware, or ought to been aware, by the time of the submission of the Plaintiff's Offer to Settle. The whole tenor and thrust of rule 10.09, and the other rules which deal with settlement conferences, offers and alternate dispute resolution, is to encourage timely resolution of disputes, thus, where possible, mitigating the necessity for parties to spend large sums of money in pursuit of, or defending civil claims, and to alleviate the court time being consumed by such claims.

[11] In the circumstances of this case, although 10.09(2)(d) is discretionary, I see no reason to depart from it. Any award of costs to which the Plaintiff is subsequently determined to be entitled will be increased by 25% as a result.

ii) What is the appropriate costs award?

[12] The Court's overarching objective when determining a cost award is to do justice between the parties in the circumstances of the case. The award is discretionary, however, the provisions of Rule 77 offer some guidance as to how that discretion should generally be exercised. Those provisions, in tandem with the tariffs referenced at the end of Rule 77, are presumed to do justice between the parties in the various circumstances to which they speak. Departure from the Rules, although permitted, should only occur, in my view, when there is sufficient reason to do so.

[13] The Tariffs of Costs and Fees to be used in determining party and party costs are set forth below:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> > (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
> >
> > > (i) the amount allowed,
> > >
> > > (ii) the complexity of the proceeding, and
> > >
> > > (iii) the importance of the issues;
> >
> > (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
> >
> > > (i) the amount of damages provisionally assessed by the court, if any,
> > >
> > > (ii) the amount claimed, if any,
> > >
> > > (iii) the complexity of the proceeding, and
> > >
> > > (iv) the importance of the issues;
> >
> > (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
> >
> > > (i) the complexity of the proceeding, and
> > >
> > > (ii) the importance of the issues;
> >
> > (d) an amount agreed upon by the parties.

TARIFF A

Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than $25,000	$ 3,000	$ 4,000	$ 5,000
$25,000-$40,000	4,688	6,250	7,813
$40,001-$65,000	5,138	7,250	9,063
$65,001-$90,000	7,313	9,750	12,188
$90,001-$125,000	9,188	12,250	15,313
$125,001-$200,000	12,563	16,750	20,938
$200,001-$300,000	17,063	22,750	28,438
$300,001-$500,000	26,063	34,750	43,438
$500,001-$750,000	37,313	49,750	63,188
$750,001-$1,000,000	48,563	64,750	80,938
more than $1,000,000	The Basic Scale is derived by multiplying the "amount involved by 6.5%.		

[14] The first step then, is to determine the "amount involved". In this case, that is not mysterious. It was the amount claimed by the Plaintiff and awarded by the Court: $42,348.92.

[15] Second, the length of the trial is equally straightforward. It lasted for a day.

[16] Next, reference to Tariff "A" reveals three different scales which may be applied after having regard to the amount involved, the complexity of the proceeding, and the importance of the issues.

[17] In addition to the equitable defence which Mr. Watters attempted to mount, there was also a question raised as to the applicability of the *Limitation of Actions Act* as to some of the funds that Belmont was seeking to recover. This argument was also unsuccessful. That aside, neither party has argued that this proceeding was complex. In fact, the Plaintiff has (fairly) conceded the opposite.

[18] As to the importance of the issues, I begin by observing that all issues involved in a trial are important to the litigants, otherwise they would not bother litigating them. But there was no wider significance. As noted, the case involved the

recovery of monies paid to the Defendant by the Plaintiff pursuant to a mistake. The trial was clearly not a complex one.

[19] Given this constellation of factors, the Plaintiff argues that it should receive scale 2 (basic) based on the amount involved, which would render a figure of $7,250.00, together with a figure of $2,000.00 representing the daily amount applicable to the length of time consumed by the trial (one day). All in all, the Plaintiff argues for an award of $9,250.00, increased by 25% because of the settlement offer.

[20] I consider the fact that the litigation itself, and the consequent expense to the parties, arose primarily as a result of the Plaintiff's mistake. Granted, the Defendant ought to have seen the writing on the wall and settled, particularly when the formal offer to do so, upon the terms previously noted, was made by the Plaintiff. However, by the time the latter had discovered its error, Mr. Watters' health had deteriorated markedly, and it was no longer possible for him to supplement his fixed income pension entitlement with any appreciable amount of work.

[21] So, it was Belmont's oversight which started this whole unfortunate chain of events. However, Belmont candidly acknowledged its error, was prompt in notifying the Defendant as soon as the error was discovered, was generous with respect to the period of time in respect of which it was seeking prejudgment interest, and has made other reasonable concessions.

[22] Belmont was the successful party. In these circumstances, it is my view that an award of scale 1 costs, which amount to $5,138.00. To this I will add the $2,000.00 daily amount, resulting in a figure of $7,138.00, which will be augmented by 25%, rendering a total cost award of $8,923.00. In my view, this will do justice between the parties.

[23] No costs were sought by the Plaintiff as a result of the dismissal of the Defendant's Counterclaim. Once again, this was a reasonable concession given the fact that no medical evidence was called in relation thereto, and the Counterclaim itself consumed a negligible amount of the Court's time.

C. Conclusion

[24] In conclusion, the Plaintiff will receive costs in the amount of $8,923.00, plus disbursements, which are said to amount to $616.00. Although no explanation has been provided with respect to the disbursements themselves, the Defendant has not

taken issue with them in its written submissions on costs. My assumption is that they are agreed to. If my assumption is incorrect, the parties may, if they choose, forward further submissions within seven days.

[25] The Plaintiff is also entitled to prejudgment interest in the amount of $5,171.00 as noted above, and I will ask counsel for the Plaintiff to prepare the form of order.

Gabriel, J.