

SUPREME COURT OF NOVA SCOTIA
Citation: *Hatfield v. Kendall*, 2023 NSSC 246

Date: 20230731
Docket: 512217
Registry: Halifax

Between:

Linda Hatfield

v.

Mark Kendall

DECISION ON COSTS
Civil Procedure Rules 77 and 83

Judge: The Honourable Justice Robin C. Gogan

Written Decision: July 31, 2023, in Sydney, Nova Scotia

Counsel: Linda Hatfield, in person
Justin Cashin, for the Defendant

By the Court:

Introduction

[1] This is a decision dealing with three matters that are contested: (1) the jurisdiction of the defendant's claims; (2) the status of the defendant's motion to amend his pleadings; and (3) cost consequences.

[2] This is a proceeding and a motion that for some reason have been protracted and remain outstanding. Directions will be given in keeping with the objectives of the *Civil Procedure Rules*.

[3] For the following reasons, this motion is disposed of as follows: (1) any and all claims between the parties that relate to the construction of Hatfield's home located at 1925 Louisburg Highway, Nova Scotia, shall proceed in the Supreme Court of Nova Scotia; (2) any and all related claims in the Small Claims Court shall be struck out and form the basis for an amendment to the pleadings in this proceeding; (3) Kendall shall perfect his motion to amend in accordance with *Civil Procedure Rule 83* forthwith, and no later than August 31, 2023 (inclusive of notice to Hatfield); (4) costs and disbursements shall be payable in any event of the cause by Kendall to Hatfield in the total amount of \$1,540.78.

[4] This decision does not preclude an award of further costs related to the completion of the pleadings.

Background

[5] This proceeding began with a Notice of Action and Statement of Claim brought by Hatfield on January 28, 2022. She alleges deficiencies in the construction of her home in 2020 and she seeks various kinds of damages from Kendall who was the carpenter hired to build the house.

[6] Kendall defends the claims. He filed a blanket defence on February 16, 2022, claiming, *inter alia*, that the proceeding was *res judicata* as a result of a Small Claims Court proceeding (No. 510767) started by him for unpaid fees. Kendall filed a builder's lien against Hatfield's property on July 15, 2021, and started the small claims court action on November 21, 2021, to recover the alleged unpaid fees.

[7] Hatfield is a self represented litigant. Kendall has been represented throughout including a change of counsel on February 16, 2023.

[8] On September 29, 2022, Kendall filed a motion to amend his pleadings and add a counter claim arguing that it would be more efficient to place all the issues between the parties in the Supreme Court. Hatfield did not oppose the amendment but sought costs and the removal of the lien on her property.

[9] The motion hearing was scheduled for October 17, 2022, but was adjourned as a result of insufficient notice to Hatfield.

[10] The motion came forward again on October 24, 2022. The matter was again adjourned. This time Kendall requested additional time to draft the amendments he was proposing. A return date was set for November 28, 2022.

[11] On November 28, 2022, Kendall appeared but was not ready to proceed. He wanted time for a “second opinion” and requested another adjournment. The motion was adjourned to January 9, 2023.

[12] On January 9, 2023, Kendall appeared on his own behalf. He advised that he intended to change counsel and needed more time. The matter was once again adjourned.

[13] The motion returned on January 23, 2023. Kendall appeared with new counsel who had not yet had time to review and prepare. Hatfield was opposed to any further adjournments. The ongoing appearances were inconvenient, and she believed that there was a consent disposition. She had never opposed the substance of the motion. The motion was adjourned to February 6, 2023. Unfortunately, a flood event at the Courthouse resulted in all Chambers matters being adjourned.

[14] The motion returned on March 6, 2023. Kendall withdrew the application. The Court then inquired about the status of the small claims proceeding. Hatfield sought costs. Deadlines were set for submissions on costs. Kendall’s submissions were due on or before March 10, 2023, and Hatfield’s by March 17, 2023. Kendall’s submissions were not filed until March 24, 2023. They were sent to Hatfield by regular mail and not received until April 4, 2023.

[15] Kendall’s submission was that his claim in the Small Claims Court should be transferred to the Supreme Court under s. 15 of the *Small Claims Court Act*, 1989 RSNS, c. 430, as amended and *Civil Procedure Rule 37.04(1)* of the *Civil Procedure*

Rules. I note that Kendall made the motion to amend over ten months ago but has yet to perfect it, despite being directed to do so at various points.

[16] Over and above, it has somehow taken a total of seven motion hearing dates (one of which was adjourned through no fault of the parties), two lawyers and a written submission to finally concede an uncontested jurisdictional point. Hatfield is justifiably frustrated with the process and with conduct that is inconsistent with the fundamental objectives of the *Civil Procedure Rules*.

[17] Hatfield properly requested extensions to file her response submissions on two occasions because she had not received Kendall's written position. These extensions were granted, and submissions received on April 11, 2023. Hatfield is now: (1) opposed to the withdrawal of the motion without notice; (2) opposed to the amendment sought; (3) seeking dismissal of the small claims court proceeding; and (4) costs.

[18] Before moving on to determine costs, I note that there is a related proceeding in which costs are also sought. On March 23, 2023, Hatfield brought an Application in Chambers for the removal of the builder's lien filed on her property (Syd. No 522342). This is the same lien referenced in the present motion. A separate decision will address costs in that proceeding (see *Hatfield v. Kendall*, 2023 NSSC 247).

Issue

[19] There are three issues to address in this decision:

- (1) What is the appropriate jurisdiction for the dispute between the parties and what directions are required in the circumstances to give effect to the objectives of the *Civil Procedure Rules*?
- (2) Is it appropriate to grant the motion to amend the pleadings and add a counter claim?
- (3) Is Hatfield entitled to a cost award at this juncture? If so, what is the appropriate amount?

Positions of the Parties

Kendall

[20] Kendall now concedes that the substance of his claim presently before the Small Claims Court should be heard as part of the Supreme Court proceeding. Kendall says that the parties should each bear their own costs on the motion to amend. Alternatively, he submits that costs may be determined but paid in the cause. As to quantum, he says that *Tariff C* produces a cost award in the range of \$750 - \$1000 dollars.

Hatfield

[21] Hatfield is frustrated. She has made consistent efforts to resolve the motion by consent and has formally said that she is not opposed to the substance of the motion on many occasions. She has been reasonable in response to adjournment requests but is now opposed to a withdrawal of the motion without notice. She also seeks dismissal of the related claims in the Small Claims Court.

Analysis

The Fundamental Objectives of the Rules

[22] When simple matters become unnecessarily complex and protracted, it is helpful to return to fundamentals. It must be said that the present motion is not

compliant with the very basic tenets of the *Civil Procedure Rules*. The first and most fundamental *Rule* is the first one which provides:

Rule 1 – Purpose

1.01 Object of these Rules

These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[23] All of the contested proceedings between the parties have their origin in disputes arising from the construction of Hatfield's home. Kendall says that he is owed money for his work. Hatfield says she is entitled to damages resulting from deficiencies in the work. Kendall began the formalities with a lien on Hatfield's property and then brought a claim in the small claims court. Hatfield's claims were either not within, or exceeded the jurisdiction of the small claims court. She brought her claims in the Supreme Court.

[24] Underlying the jurisdictional complexities were procedural irregularities with the matter in the small claims court. Kendall's claim in the Small Claims Court was dismissed after a missed hearing, then successfully appealed and returned to the small claims court. Hatfield, a self-represented litigant with health issues was required to: (1) make many court appearances; (2) navigate the procedure of two separate courts (impacted by COVID-19 related procedural changes and even a flood closing the Courthouse); and (3) endure the delay caused by Kendall's change of counsel, in order to protect her rights with respect to one set of parties and a common dispute. It has been unnecessarily complex.

[25] The entirety of the dispute between the parties is overdue for some housekeeping. I refer to the authority in *Rule 2* to provide general directions consistent with the overall purpose and object of the *Rules* and substance of specific *Rules*.

(1) Conclusion of the Small Claims Court Proceeding

[26] The parties must recognize that the Small Claims Court of Nova Scotia and the Supreme Court of Nova Scotia are different courts with different jurisdiction and administration.

[27] At this point, there is no contest that all aspects of the dispute belong together and must proceed in the Supreme Court of Nova Scotia in order to address all the common issues and relief sought. I refer to *Rule 37.04* which allows for an Order to have two or more proceedings with common issues tried together. But this Court has no ability to control the proceedings or administration of matters in the Small Claims Court. Given Kendall's concession that all common claims should be heard together in Supreme Court, I direct that he does whatever is required to conclude the small claims proceeding forthwith, and no later than August 31, 2023.

(2) The Motion to Amend Pleadings and Add Counterclaim

[28] Related to the directions given to conclude the small claims proceeding, the intent is to permit Kendall's claims against Hatfield to proceed under Syd. No. 512217. The motion to amend the defence to reflect this intent was made on September 29, 2022. For some reason, it has yet to be perfected. There must be compliance with *Rule 83 – Amendments* (see *Rules 83.08* and *83.11*). This must be

done forthwith, and no later than August 31, 2023 (inclusive of notice to Hatfield).

[29] Hatfield shall have until September 15, 2023, to determine whether she contests any aspect of the proposed amendments. She shall advise Kendall's counsel in writing as soon as that determination is made. If no notice is provided to Kendall by September 15, 2023, she will be deemed to consent to the amendments and thereafter the amendments will only be subject to the approval of the Court. If there is some contest, the matter shall return to Chambers on the earliest date after September 15, 2023, that is convenient to both parties. Once Kendall's amendments are settled, Hatfield will have the opportunity to defend any counterclaim.

[30] If Kendall fails to perfect the motion to amend by August 31, 2023, the motion shall be dismissed with prejudice.

(3) Costs on the Motion

[31] I am satisfied that it is appropriate to address costs at this stage notwithstanding that the motion to amend is not yet concluded.

[32] When the parties last appeared, Kendall's position was that he was withdrawing his motion. This was a surprise change in position given that he had: (1) made the motion; (2) pursued it consistently (albeit not diligently) for over six months; and (3) not provided any notice of intended withdrawal. The Court inquired about the impact on what it understood was still a proceeding before the Small Claims Court. In the absence of clear intention and adequate notice, the Court gave directions for submissions on jurisdiction and costs.

[33] In the submission that followed, Kendall again changed direction – he now conceded that all issues between the parties must proceed in the Supreme Court. The motion to amend once again remains outstanding and non-compliant with the *Rules*. All of this must be rather turbulent for Hatfield to comprehend. I agree that the conduct of this motion has not been consistent with the purpose and object of the *Rules*. In fact, it is antithetical. I find that justice requires a cost award at this juncture.

[34] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, Justice Ann E. Smith summarized the applicable principles when determining costs:

Costs

[2] The general rule is that costs follow the event. That rule is not absolute. There are no reasons why that rule should not apply here. The real issue is the amount of those costs.

[3] The starting point in determining the quantum of costs is the *Tariffs of Costs and Fees* under *Rule 77*. Costs on a motion are governed by *Tariff C* unless the judge orders otherwise: *Rule 77.05(1)*. A judge has the discretion to add or subtract from the tariff amount: *Rule 77.07*. Furthermore, a judge “may award lump sum costs instead of tariff costs”: *Rule 77.08*.

[4] The guiding principles in awarding costs were considered by the Nova Scotia Court of Appeal in *Armoyan v Armoyan*, 2013 NSCA 136. Hunt J. recently summarized the Court’s comments from *Armoyan* in *Grue v McLellan*, 2018 NSSC 151, [2018] NSJ No 262:

6 In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;
2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.07(2)*. These factors include an unaccepted written settlement offer, whether the offer was made formally under *Rule 10*, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
3. The *Rule* permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15

4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16
5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding workload, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and
7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[22] The general rule is that costs are awarded to the successful party in the amount provided by the tariffs. CPR 77.02 confirms the judge's general discretion over party and party costs:

77.02 General discretion (party and party costs)

- (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
- (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[23] For costs on a motion, the starting point is typically Tariff C, which sets a range of \$750-\$1000 for a hearing longer than an hour but less than half a day. Tariff C states:

TARIFF C

Tariff of Costs payable following an application heard in Chambers by the Supreme Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

- (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
- (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
- (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the

application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

- (a) the complexity of the matter,
- (b) the importance of the matter to the parties,
- (c) the amount of effort involved in preparing for and conducting the application.

(Such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	Range of
Costs Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
\$1,000 More than ½ day but less than 1 day	\$1,000 - \$2,000
1 day or more	\$2,000 per full day

[24] A judge has discretion under Rule 77.07 to increase or decrease the tariff amounts. Rule 77.08 permits a judge to depart from the tariff and order a lump sum. Ultimately, costs are properly in the discretion of the presiding judge, who “may, at any time, make an order about costs as the judge is satisfied will do justice between the parties”. ...

[35] In the present case, the motion brought by Kendall has not concluded after six appearances in Chambers and over ten months. During the many appearances, Hatfield has rarely objected to the substance of motion to amend, preferring to have all the litigation in the Supreme Court. Hatfield has raised collateral issues during the various appearances that prolonged them. From her perspective, this proceeding, the motion brought by Kendall, the small claims proceeding, and the builder’s lien issue are all related. I take some account of this is the assessment of costs, but it is not a significant consideration in the overall circumstances.

[36] I find it just and appropriate to award costs to Hatfield as the respondent on the motion. Although she is self-represented, it is evident that she spends considerable time researching the law and preparing written submissions. I must account for time that she spends doing so. I consider that because she is self-represented, her matter is often called last on the Chambers docket. She is always on time and often waits up to an hour for the matter to be called. Given the six appearances, the total time spent responding to the motion has been considerable. I find that the appropriate range under Tariff C is between a half day and a full day.

[37] I conclude that Hatfield is entitled to a cost in the amount of costs is \$1,500.00. She shall also have her disbursements in the proven amount of \$47.77 - \$6.99 = \$40.78. The total cost award is therefore \$1,540.78. The amount of \$40.78 shall be paid forthwith. The balance of \$1,500.00 shall be payable on or before January 1, 2024.

Conclusion

[38] This motion and the main proceeding have languished for too long. Steps need to be taken to consolidate and resolve procedural issues so that matter may move forward to a substantive determination. For these reasons, directions are given, and deadlines set for next steps, in order to move the matter forward without further cost and delay.

[39] The circumstances here require an award of costs. The total amount of \$1,540.78 reflects the considerable delay and effort in responding to a motion that should have been straight forward and proceeded on consent. This sum will do

justice between the parties for the conduct of the motion thus far, encourage future compliance with the *Rules*, and more efficient carriage of the matter going forward.

Gogan, J.