

SUPREME COURT OF NOVA SCOTIA
Citation: *O'Neil v. Lagassey*, 2024 NSSC 209

Date: 20240229
Docket: 519427
Registry: Halifax

Between:

Kim O'Neil and Daniel O'Neil

Applicant

v.

Paul Lagassey

Defendant

COSTS DECISION

Judge: The Honourable Justice Mona Lynch

Heard: February 28, 2024, in Halifax, Nova Scotia

Oral Decision: February 29, 2024

Costs Submissions: March 8, 2024 – Applicants
April 3, 2024 – Respondent

Final Written Decision: July 16, 2024

Counsel: Jamie Simpson, for the Applicant
Matthew Moir and Jessica Rose, for the Respondent

By the Court:

[1] This is the costs decision on an Application in Court. The hearing had been originally scheduled to be heard in December of 2023 but, at the last minute, the Respondent requested an adjournment of the hearing because of his health. An adjournment was granted and the costs associated with that adjournment are being dealt with by the presiding judge in December of 2023. The matter was scheduled to be heard on February 28 and 29, 2024.

[2] On February 28, 2024, the Respondent again requested an adjournment of the hearing because of his health. That adjournment request was denied. The matter was heard on February 28, 2024 and an oral decision was given on February 29, 2024.

[3] The Respondent was found to have breached the contract between the parties and damages in the amount of \$67,678.75 plus prejudgment interest were awarded to the Applicants. The parties were unable to reach an agreement on costs and written submissions were provided.

Issue:

[4] What is the appropriate costs award in the circumstances of this case?

Position of the Parties:

[5] The Applicants' position is that the costs should be awarded pursuant to Tariff A (\$9,750), 1.5 days of hearing (\$3,000), disbursements (\$765.95) and a 50% increase in costs (\$6,757.96) for a total costs award of \$20,273.91.

[6] The Applicants sent a formal offer to settle to the Respondent on August 1, 2023 which they say was open until withdrawn, which it was not, or until the hearing began.

[7] The Respondent's position is that the formal offer to settle did not meet the criteria for a formal offer to settle under *Civil Procedure Rule* 10.05 for a number of reasons including:

- a) *Rule* 10.05 applies to Actions and this matter was an application;
- b) The offer to settle was withdrawn when a new offer to settle was made;

- c) The new offer to settle was open until withdrawn or until 6:00 pm November 21, 2023 and therefore was not compliant with *Rule 10.05(5)(a)*.

[8] The Respondent suggests that any increase in costs attributable to an offer to settle should be 10% and only in relation to amounts pursuant to Tariff A and days in court. The Respondent calculates the days in court as one day as the other time was for the oral decision. The Respondent submits that \$13,715.95 is the appropriate award of costs in this matter.

Analysis:

[9] *Civil Procedure Rule 77.02* provides a general discretion to make an order that will do justice between the parties. Both parties agree that the Tariff A amount is \$9,750.00. I agree that the hearing lasted one day so another \$2,000 should be added. The Applicants seek disbursements of \$765.95 and those will be awarded.

[10] The Applicants ask that I consider the offer to settle of August 1, 2023 a formal offer to settle under *Rule 10.05*. However, another offer to settle pursuant to *Rule 10.05* dated September 20, 2023 specifically said it “replaces the previous formal settlement offer”. *Rule 10.05(5)(a)* requires the offer to be open for acceptance until it is withdrawn or the trial begins. The September offer to settle was not open until it was withdrawn but it was open until November 21, 2023. I do not find that either offer to settle from the Applicants meet the formal requirements of *Rule 10.05*.

[11] Not being compliant with *Rule 10.05* does not mean that the offer to settle cannot be considered in an award of costs. *Rule 77.07 (1)* allows a judge to add an amount to or subtract an amount from tariff costs. *Rule 77.07 (2)* allows me to consider a written offer of settlement whether made formally under *Rule 10* or otherwise. The award damages made by the court was more favourable than either of the written offers to settle from the Applicants. The first offer to settle was made prior to the finish date and the second offer was made about six weeks prior to the original hearing dates in December 2023.

[12] An appropriate increase for the two offers to settle which were more favourable to the Respondent than the award of damages by the court is 50%.

[13] The court awards costs to the Applicants in the amount of \$9,750 according to Tariff A, plus \$2,000 for one day in court, 50% increase for failing to accept either written offer of \$5,875 plus disbursements of \$765.95 for a total of \$18,391.

Conclusion:

[14] The Applicants are awarded costs in the amount of \$18,391 inclusive of disbursements. Counsel for the Applicants is to prepare the order.

Lynch, J.