SUPREME COURT OF NOVA SCOTIA

Citation: *Rutledge v. Rutledge*, 2024 NSSC 212

Date: 20240717
Docket: 514735
Registry: Halifax

Between:

Brad Alan Rutledge

Plaintiff

v.

Kayla Marie Rutledge

Defendant

D E C I S I O N

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 15, 2024, in Halifax, Nova Scotia
Final Written Submissions:	June 10, 17 and 25, and July 4, 2024
Counsel:	Peter Rumscheidt, for the Plaintiff Sandra L. McCulloch, for the Defendant

By the Court:

Overview

[1] The parties appeared on May 15, 2024, in relation to the plaintiff's motion seeking an order enforcing a settlement the plaintiff says was reached between the parties. The defendant, Kayla Marie Rutledge, was represented by Mark Bailey at the time of the alleged settlement. She retained new counsel, Sandra McCulloch, who requested an adjournment of the plaintiff's motion. I granted the adjournment. The hearing was rescheduled for May 28, 2024.

[2] Between May 15 and May 24, 2024, the parties reached a resolution of almost all matters in issue. Counsel agreed that the two remaining issues would be dealt with by way of written submissions to the court rather than by way of a hearing on May 28, 2024. The parties advised they did not wish to make additional oral submissions.

[3] There are two remaining issues for the court to resolve:

1. The terms of the mutual release; and,
2. Costs of the motion.

Background

[4] This proceeding involves the plaintiff's claim that certain real property owned by his late mother at the time of her death should be considered assets of the estate rather than the property of the defendant as the surviving joint tenant.

[5] In a separate application filed in the Probate Court, the plaintiff sought an order for proof in solemn form of his late mother's will and an order dispensing with the need for Ms. Rutledge to renounce as one of the two named co-executors. The proof in solemn form application was required because of uncertainty as to whether Ms. Rutledge was in possession of her mother's original will. Subsequent to the application being filed, confirmation was received from Mr. Bailey that the original will was provided to Ms. Rutledge. Consequently, the only live issue that remained with respect to the probate application was whether the renunciation of Ms. Rutledge as a co-executor could be dispensed with.

[6] The Supreme Court proceeding was scheduled to be heard before me on March 11 to 14, 2024. On the first day of trial, Mr. Bailey requested an adjournment, which was opposed. After discussions between counsel, it was agreed that the trial would begin the next day, on March 12.

[7] Settlement discussions took place on March 11, 2024. These discussions continued into the next day before trial opened. The parties reached an agreement, and the terms of the settlement were read into the record.

[8] When the settlement terms were put on the record, the court asked Mr. Bailey whether Ms. Rutledge understood and agreed to the terms. Mr. Bailey confirmed that she did and stated, "My Lady, that accurately reflects the settlement that I was instructed to accept on behalf of my client." The defendant was present in the courtroom for this whole proceeding. Based on counsels' representations that a settlement had been reached, I adjourned the trial. I agreed to retain jurisdiction in the event that any issues arose with implementation of the terms of the settlement.

[9] As noted earlier, this proceeding was brought to determine whether five properties belonged to the defendant or were beneficially owned by the parties' mother, Carol, at the time of her death, such that the properties were assets of her estate. The plaintiff swore an affidavit on April 26, 2024, attaching a transcript of the proceedings on March 11 and 12, including the terms of settlement read into the record.

[10] Counsel advised of the agreement relating to the properties located at Spry Harbour:

> <u>Mr Rumscheidt:</u> So the first one is number 7, Spry Harbour, PID ending 8052, and my comments on that property are exactly the same on the next page, which is the second Spry Harbour property, PID ends 1463. So we have a joint agreement on both of those.
>
> …
>
> Mr. Rumscheidt: So with respect to both of those properties, Ms. Rutledge will retain 100 percent ownership, but what we're going to do is retain an appraiser, one appraiser agreed to by both parties. The appraiser will give us a report on the value of those two Spry Harbour properties, and Ms. Rutledge will pay to Mr. Rutledge 85 percent of the appraised value.
>
> …
>
> So that's the outcome … oh, I guess the other part of that is if, for some reason, Ms. Rutledge is unable to get the required payment, sort of the backup or the default

> outcome … is … Ms. Rutledge will sign a deed and Mr. Rutledge will be an 85 percent tenant-in-common owner of the two properties. Ms. Rutledge would be a 15 percent tenant-in-common owner.

[11] The subject of mutual releases is addressed at page nine of the transcript:

> There will be mutual releases, and in particular, releases agreeing that neither Mr. Rutledge nor Ms. Rutledge will make any claim against the other as it relates to the properties they are keeping.
>
> [My emphasis]

[12] It was clear that the agreement contemplated one of two different outcomes with respect to the Spry Harbour properties, depending on the defendant's ability to obtain financing. Under the first or "default" scenario, Ms. Rutledge would pay an amount to Mr. Rutledge in exchange for ownership of both properties. Under the second "back up" scenario, Ms. Rutledge would sign a deed making herself and Mr. Rutledge tenants in common of both properties, with Mr. Rutledge having an 85% interest and Ms. Rutledge having a 15% interest. Ms. Rutledge agreed to make all good faith efforts to secure the financing necessary to buy out Mr. Rutledge. If her efforts were successful, she was mandated to pay the plaintiff 85% of the value of the Spry Harbour properties and become the sole owner.

[13] Following adjournment of the plaintiff's motion to enforce the settlement, Ms. Rutledge, through her new counsel, requested revisions to the order proposed by Mr. Rutledge on the motion to enforce settlement. Mr. Rutledge's proposed order stated as follows:

> 6. Within forty-five (45) business days of the appraisal having been received by the Defendant, she **shall** determine if she can obtain the necessary financing in order to pay to the Plaintiff eighty-five percent (85%) of the appraised value of the two (2) properties. If the Defendant is able to pay the calculated amount, she **shall** do so within thirty (30) calendar days of the approval of financing.
>
> 7. If the Defendant is not able to obtain financing such that she can pay to the Plaintiff eighty – five (85%) of the appraised value of the Spry Harbour properties, the Defendant shall execute a Deed naming the Defendant and the Plaintiff as tenant in common owners of the two Spry Harbour properties. The Plaintiff will have an eighty – five percent (85%) ownership interest and the Defendant will have a fifteen percent (15%) ownership interest.
>
> …
>
> 9. The Plaintiff and the Defendant will sign a Mutual Release with respect to any claims they might now or in the future have with respect to the properties or interest

> therein (each is to receive as a result of the settlement). The form of Mutual Release to be signed by the parties is attached hereto as Schedule “A”;

[14] Ms. Rutledge’s request was that she be given an election with respect to whether she would buy out Mr. Rutledge to become the sole owner of the Spry Harbour properties, even if she was approved for financing. In other words, the defendant wanted the right to choose which of the two scenarios to execute, regardless of her ability to obtain financing. Mr. Rutledge agreed to this request, and the election is now reflected in the wording in paragraph 5 of the order at Exhibit “D” of Mr. Rutledge’s affidavit of June 10th. Ms. Rutledge is now entitled to choose shared ownership of the properties with the plaintiff even if financing is available to her.

[15] The argument now raised by Mr. Rumscheidt on behalf of the plaintiff is that under the second scenario of shared ownership, neither party would be “keeping” the Spry Harbour properties. As a result, the mutual releases should not include the Spry Harbour properties.

[16] According to the plaintiff, his exposure has increased now that Ms. Rutledge has full discretion with respect to whether she buys out his interest in the Spry Harbour properties even if she is approved for financing. He submits that he never agreed to provide a mutual release in relation to the Spry Harbour properties if the properties are to be held by the parties as tenants in common. He says the requirement for mutual releases will only be triggered if the defendant elects to purchase the properties and become the sole owner.

[17] Mr. Rutledge proposed the following release based on the agreement that the default position was Ms. Rutledge would obtain financing and purchase the Spry Harbour properties.

> 2. The Defendant does hereby remise, irrevocably and unconditionally release and forever discharge and hold harmless the Plaintiff with respect to any claims the Defendant may now or in future have arising from or as a result of the property interest the Defendant is to receive from the Plaintiff and in particular releases claims with respect to the interest of the Plaintiff the Defendant is to receive with respect to the properties with following PIDs:
>
> - 00428052;
>
> …
>
> - 40261463; and
>
> …

[Exhibits E & C, respectively to Mr. Rutledge's affidavit dated April 26 and June 10, 2024]

[18] Rather than a release by each party of any potential claims against the other in relation to the Spry Harbour properties, this provision contemplates only a release by the defendant of any claims she may have against the plaintiff in relation to those properties. A mutual release was only ever proposed in relation to properties owned solely by one of the parties.

[19] The defendant argues that the plaintiff is trying to inject a new term into the agreement in the form of a reservation of rights. She argues that mutual releases should be exchanged regardless of ownership interest.

[20] I find there is no evidence before the court that mutual releases in relation to the Spry Harbour properties were discussed and agreed to by the parties on March 12, 2024. Mutual releases were contemplated in relation to properties each would "keep" – that is, that each would own. There was no discussion on the record about mutual releases for land held as tenants in common.

[21] It is Ms. Rutledge and not Mr. Rutledge who is seeking to add a new term to the binding settlement reached on March 12, 2024. I have reviewed the settlement terms read into the record by counsel and there is no indication that the agreement in relation to mutual releases was intended to extend to properties held as tenants in common.

Costs of the Wasted Enforcement Motion

[22] 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 appropriate amount of costs.

[23] 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:

> 77.05 Assessment of interlocutory costs
>
> > (1) The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.
> >
> > (2) A judge may assess costs, and provide for payment of costs, when a motion is withdrawn or abandoned.

[24] 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).

[25] 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 in *Armoyan* in *Grue v McLellan*, 2018 NSSC 151:

> 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:
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> > 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 work load, 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.

[26] 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.

[27] Tariff C sets a range of $750-$1,000 for a motion hearing longer than an hour but less than half a day.

[28] However, Civil Procedure Rule 77.09 reads, in part:

> (1) This Rule 77.09 applies to an indemnification under any of the following Rules, or a similar Rule:
>
> > (a) Rules ... 4.21 ... (e) ... of Rule 4 - Action;
>
> (2) A judge may order indemnification for all of the following amounts under a Rule to which this Rule 77.09 applies:
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> > a. a substantial contribution towards the costs of necessary services of counsel, or a fair payment for the work of a person who acts on their own:
> >
> > b. necessary and reasonable out of pocket expenses or disbursements;
> >
> > c. fair compensation for a harm or loss referred to in the applicable Rule.

[29] The plaintiff seeks costs in the amount of $3,000.00. The defendant argues the appropriate amount payable to the plaintiff is $750.00.

[30] I agree with the plaintiff that the motion to enforce the settlement should not have been necessary given that the settlement terms were confirmed on the record on March 12, 2024, with counsel in the presence of all the parties. While Ms. Rutledge may take issue with her previous legal counsel, she was in attendance in court when the settlement was confirmed on the record and the terms read into the record. At no time was there any suggestion that a settlement had not been reached. It is common ground among the parties and their counsel that the actions, or more specifically the inactions, of Mr. Bailey contributed significantly to the plaintiff having to bring a motion for a declaration that there was a settlement and its terms.

[31] As noted earlier, this motion is governed by Tariff C of the Civil Procedure Rules. A motion which lasts more than an hour but less than a half day calls for costs between $750.00 - $1,000.00. Given the time and effort of plaintiff's counsel and given that the motion would not have been necessary but for Mr. Bailey's lack of communication with his own client, an amount of $1,000 is appropriate.

[32] While I have some sympathy for the defendant's position that she should not be penalized for the conduct of her former counsel, the fact remains that the plaintiff, through no fault of his own, has been put to significant time and expense to finalize a matter which was largely resolved on March 12, 2024.

[33] To the amount of $1,000.00, I would add an additional amount of throw-away costs in recognition of the fact that the efforts made on behalf of Mr. Rutledge to enforce the settlement were wasted. I have the discretion to do so and add $1,000.00 for throw away costs for a total of $2,000.00.

[34] Attached to the plaintiff's affidavit of June 10, 2024, is a "pre-bill" from Weldon McInnis. The fees for preparation of the motion to enforce are $5,063.00. The disbursements incurred were $541.19 plus HST of $71.27. The total for fees, disbursements and HST is $6,439.86.

[35] Disbursements incurred by Weldon McInnis for the purpose of the motion materials are $541.14. Mr. Rutledge has agreed to reduce that claim to $500.00, I find that this is appropriate and the charges were all incurred in relation to the motion for enforcement. I order $500.00 in disbursements.

Conclusion

[36] The defendant shall pay the plaintiff $2,000.00 in costs plus $500.00 in disbursements forthwith.

Brothers, J.