SUPREME COURT OF NOVA SCOTIA
Citation: Gillis v. Roy Stutely Plumbing and Heating Ltd., 2013 NSSC 249

Date: 20130808
Docket: Hfx. No. 183960
Registry: Halifax

Between:

Kathy Gillis

Plaintiff

v.

Roy Stutely Plumbing and Heating Limited, a body corporate
and The Estate of Roy Stutely

Defendants

and

Intact Insurance Company

Intervenor

COSTS DECISION

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	Halifax, Nova Scotia
Final Written Submissions:	April 23, 2013
Written Decision:	August 8, 2013
Counsel:	Brian J. Hebert for the Plaintiff Scott C. Norton, Q.C. for the Defendant

By the Court:

[1] The plaintiff seeks costs against the Intervenor.

[2] **ISSUES**

1. Payment of costs by Intervenor
2. Quantum of Costs

[3] In an earlier decision **(**2012 NSSC 244), the court awarded damages in favour of the plaintiff. The defendants did not participate in the proceeding. Default judgment was entered and Intact Insurance Company was granted Intervenor status for the assessment of damages hearing. In the assessment of damages decision, the court concluded that the plaintiff was entitled to her costs and disbursements.

[4] The plaintiff says the Intervenor should pay costs because it had a significant financial interest in the outcome of the case. She cites *Turner-Lienaux v. Nova Scotia (Attorney General)*, [1992] N.S.J. No. 36 (S.C.) as authority.

[5] The Intervenor says that the usual rule is that costs are not awarded against the Intervenor. It says it depends upon all the circumstances. The Intervenor cites *Hines v. Nova Scotia (Registrar of Motor Vehicles),* [1990] N.S.J. No. 468 (S.C.). Davison, J. said at para. 15:

> 15. ... Undoubtedly there are situations where a party is added as *amicus curiae* where the awarding of costs both for or against the intervenor would be appropriate. Undoubtedly, there are some situations where the intervenor is added as a party where costs should not be awarded. These will depend upon the discretion of the court which will consider all of the circumstances including whether the interest of the intervenor is private or public.

[6] *Civil Procedure Rule 77.02* provides as follows:

> (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.

[7] In *A.B. v. Bragg Communications*, 2010 NSSC 356, Justice LeBlanc referred to the general rule that Intervenors are not to be subject to an award of costs. He said in paras. 11 and 14:

> [11] The general rule with respect to costs and intervenors is 'that the intervenors are not awarded costs, nor are costs awarded against them.': see *Toronto Police Association v. Toronto (Metropolitan) Police Services Board*, [2000] O.J. No. 2236 at para. 7; *Tauber, supra* at para. 11; *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 1515 at para. 6; *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers*, *Local 832* (1990), 70 Man R. (2d) 59. 'The Court has power to award costs for, or against, intervenors ..., however, it appears that it is not the usual practice of the court to award such costs.': *University of British Columbia Faculty Association v. University of British Columbia*, 2009 BCCA 56 at para. 4.

> [14] Although the Herald and Global argue that the principle that costs should follow the results [sic] also applies to them as intervenors, I find no general rule of law that suggests that to be the case. It appears to me that the general rule that applies to the intervenors should not be an award of costs in their favour, nor should costs be awarded against them unless there is very good reason to deviate from this practice. Therefore, the issues that must be addressed are whether the nature of this application modifies the general rule regarding costs and intervenors, and whether the Herald and Global Television have demonstrated a very good reason to deviate from the general rule, modified or otherwise.

[8] In my view, this is not a case where there is good reason to deviate from the general rule. The intervenor in its brief set out its reasons for participating. The Intervenor said:

> 6. ... the Intervener (*sic)* apprehended that the Plaintiff might obtain a higher-than-appropriate award of damages on the basis that her evidence and position would be unchallenged by the non-present Defendants. In other words, the Intervener *(sic)* sought to protect its potential interests in the event that: (a) the Plaintiff is awarded damages; (b) the Plaintiff then brings a proceeding against the Intervener *(sic)* for a determination of coverage; and (c) the Court concludes that the Intervener *(sic)* must cover the loss.

[9] The Intervenor expanded upon its reasons why no costs award should be made against it at para. 19 of its brief where it said it would be "improper and unjust" to award costs against it. It gave the following as reasons:

> (a) the Intervener *(sic)* is not liable for payment of the award of damages;
>
> (b) the Intervener *(sic)* participated in the trial to necessarily protect its potential interests;
>
> (c) the Intervener *(sic)* participated in the trial to ensure that the Plaintiff would not reap an unjust advantage from her failure to seek a determination on coverage before the assessment of damages;
>
> (d) the Intervener *(sic)* provided significant assistance to the Court in what would have otherwise been a one-sided dispute; and
>
> (e) the Intervener *(sic)* was substantially successful in the reduction of the claim advanced by the Plaintiff.

[10] I conclude that it would not be appropriate to award costs against the Intervenor under these circumstances. The Intervenor had denied coverage and the plaintiff had not brought a proceeding against the Intervenor for coverage. It is true that the Intervenor sought to protect its private interests but it did so in circumstances where it really had no choice but to do so since the defendants were not participating and default judgment had been entered. The claim was a

substantial one ($1.3 million) and the Intervenor was successful in assisting the court to conclude that a proper award of damages was a total of $57,108.17 plus pre-judgment interest.

[11] Costs are accordingly awarded against the defendants only.

QUANTUM

[12] The Intervenor says that the 1989 tariff is the tariff to be used because the action was commenced in 2002. The plaintiff does not disagree but seeks a lump sum award of $10,000.00 in addition with disbursements to be taxed. The plaintiff cites *Williamson v. Williams*, 1998 NSCA 195, as authority for an award of costs which would be a substantial indemnity towards costs. Freeman, J.A. said:

> In my view a reasonable interpretation of this language suggests that a 'substantial contribution' not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. ...

[13] The plaintiff points out that, as the result of a Contingency Fee Agreement, the actual fees based on the award will be "in the order of $17,500.00 plus HST." I conclude that a substantial contribution toward costs, but not a complete indemnity, is an award of costs of $4,875.00 plus a lump sum award of $8,000.00. Disbursements are to be taxed.

Hood, J.