

SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Manor Custom Homes Inc.*, 2014 NSSC 281

Date: 2014-07-17

Docket: *Halifax*, No. 412948

Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Manor Custom Homes Incorporated and James Drage

Defendants

Judge: The Honourable Justice Peter P. Rosinski

Heard: May 7, 2014, in Halifax, Nova Scotia

**Final Written
Submissions:** May 16, 2014

Counsel: Gavin D.G. MacDonald, for the Plaintiff
Fergus Ford, for the Defendants

By the Court:

Introduction

[1] On May 7, 2014 I granted summary judgment as against the Defendants. The hearing lasted from 11:00 a.m. to 12:00 p.m. I requested submissions regarding the Plaintiff's request for solicitor client costs based on agreements signed between the parties.

Procedural History

[2] On March 1, 2013 the Plaintiff filed a Notice of Action for Debt. It claimed the amount of \$112,292.03 plus interest on that amount calculated from November 6, 2012 and costs of \$600 plus taxed disbursements. On April 30, 2013 the Defendants filed a Notice of Defence and Counterclaim.

[3] The Defendants claimed that the Plaintiff failed to forbear pursuant to a Forbearance Agreement, and that as a result the Defendants were unable to conduct their business and prevented from completing the Forbearance Agreement. The Counterclaim pleaded that the Plaintiff's failure to allow the Defendants to maintain or conduct their normal business, by not maintaining their personal or

corporate accounts, resulted in a loss for which the Defendants claimed \$50,000 in liquidated damages.

[4] The Plaintiff's Notice of Defence to Counterclaim filed November 26, 2013, in essence, pleaded that the Plaintiff was entitled to take the actions that it did, and in any event the Defendants suffered no loss.

[5] On January 15th, 2014 the Plaintiff filed its Motion for Summary Judgment on Evidence. The motion was to be heard April 3, 2014 at 11:00 a.m.. On March 19th, 2014. Plaintiff's counsel requested an adjournment, and the new date offered was May 7th, 2014. On April 23rd, 2014 the Plaintiff filed its brief. In the brief it claimed costs and disbursements against the Defendants on a joint and several basis.

[6] The Defendants filed no materials in response, however counsel appeared on their behalf at the hearing. Defendants' counsel did not take part in the hearing, until the matter of costs arose, and then requested the opportunity to address those in writing in response to the Plaintiff's anticipated written post-hearing submissions.

[7] The evidence before the Court on the summary judgment motion was limited to the affidavit of Mr. Al-Owaishi, a commercial account manager at the Royal

Bank of Canada, whose 29 paragraph affidavit and numerous attachments [Tabs A to O] set out the paper trail herein.

[8] I note that the borrower in all cases was the Corporation, whereas Mr. Drage is only involved as guarantor of the borrower's debts.

Position of the Plaintiff as to Costs

[9] The Plaintiff submits that, (and Defendants counsel agrees, that the law is as stated by Justice Wood in *Xceed Mortgage Corporation v. Jesty* 2014 NSSC 51), it is entitled to "solicitor and client costs" as a result of the inclusion of wording in the "loan agreement" described at paragraph 5 and Exhibit A of the affidavit:

Fees, costs and expenses,

The borrower agrees to pay the bank all fees stipulated in this agreement and all fees charged by the bank relating to the documentation and registration of this agreement and the security. **In addition, the borrower agrees to pay all fees [including legal fees] costs and expenses incurred by the bank in connection with the preparation, negotiation, documentation and registration of this agreement and any security and the administration, operation, termination, enforcement or protection of its rights in connection with this agreement and the security....**

[10] The Plaintiff submits that is also entitled to "solicitor and client costs" pursuant to the RBC Visa Business Card Agreement described at paragraph 5 of Exhibit A to the Affidavit:

Termination

you or we [the borrower] may terminate this agreement at any time by giving written notice of termination...

(c) **Upon termination of this agreement, we must pay all debt for each account you at once**, and ensure that each cardholder destroys their card and returns any unused Visa checks. **If we fail to comply with our obligations** to you under this agreement, **we will be liable to you for:**

(i) **all court costs and reasonable legal fees and expenses [on a solicitor client basis] you incurred through any legal process to recover any debt**, and

(ii) all costs and expenses you incur in reclaiming any card.

[11] The Plaintiff also claims it is entitled to “solicitor client costs” pursuant to the Guarantee and Postponement of Claim signed by Mr. Drage making himself personally liable for the debts of the corporation – see paragraph 6 and Exhibit B to the Affidavit:

(12) No suit based on this guarantee shall be instituted until demand for payment has been made... Moreover, **when demand for payment has been made**, the **undersigned shall also be liable to the bank for all legal costs [on a solicitor and own client basis] incurred by or on behalf of the bank resulting from any action instituted on the basis of this guarantee....**

[12] Also submitted by the Plaintiff is the Affidavit of Gavin D.F. Mac Donald which provides an evidentiary basis for a claim for total legal fees of \$14,156 plus HST of \$2126.81, and total disbursements of \$587.60 plus HST of \$32.39. Thus, the total claim is \$16,902.80 for “solicitor and client” legal costs, disbursements and HST. The Plaintiff relies on Justice Davison’s decision in *Canada Trustco. Mortgage Company v. Homburg* (1999) 178 N.S.R. (2d) 356.

[13] The Plaintiff argues alternatively that if the Court is not satisfied for full indemnification, that the Court, pursuant to Rule 77.08, has a discretion to set a lump sum figure and that such amount should be a “substantial indemnification for the plaintiff’s costs.”

[14] In the further alternative, the Plaintiff argues that the Tariff C amount of \$500 should be multiplied by three for a total of \$1500.

Position of the Defendants on Costs

[15] The Defendants argue that there is ambiguity in the documentation provided by the Plaintiff’s commercial bank manager, and that Mr. Drage is not a direct signatory to the Loan Agreement or the RBC Visa Agreement, and the wording of those agreements do not exclude legal costs being awarded on an either taxed or Rule 77 tariff basis as against him personally.

[16] The Defendants’ counsel relies on a later case from Justice Davison (*Canada Trustco. Mortgage Company v. Homburg* (1999) 180 N.S.R. (2d) 258, as the basis for its assertion that, although the general rule is that where written contractual arrangements specifically allow recovery of costs “on a solicitor client basis, costs should be awarded on that basis except in special circumstances”, there are special circumstances here.

[17] In that light, the Defendants then review the invoices submitted in the Affidavit of Mr. Gavin MacDonald. The Defendants specifically assert that “the matters being billed for work, for the Plaintiff’s counsel law firm, are both routine and without complexity. In light of the case law and the Civil Procedure Rules, the Defendants are requesting costs to be assessed as per Rule 77 Tariff C in the amount of \$500 for a one-hour hearing multiplied by three (3) for a total of \$1500.”

Analysis

[18] I note that in the second *Homburg* case the issue was the hourly rate for counsel and that the taxing master prepared an affidavit and was cross examined in court in relation to that issue. Justice Davison concluded: “when I consider the rates charged per hour for lawyer services, the number of lawyers who worked on the file and the expansive nature of the services, I find there were unnecessary costs and the imposition of solicitor and client costs on the mortgagor, as set out in the statements of account, would be “unfair and unduly onerous”.

[19] In the case at Bar, I keep in mind that I heard an undefended motion for summary judgment. The matter consumed one hour of court time. One affidavit, not unduly complex, was submitted. My granting of summary judgment

successfully terminates the proceedings for the Plaintiff. Ultimately the Defendants determined it was not worth contesting the summary judgment, which they understood would likely lead to the successful termination of the action in favour of the Plaintiff. Thus the Defendants must have expected costs for the proceeding would be addressed as a consequence of the summary judgment motion.

[20] While the Defendants did not unnecessarily delay the proceeding by actively defending their position, their passivity did require the Plaintiff to make the motion in order to bring the proceeding to a conclusion.

[21] Thus it is fair for the Plaintiff to look for costs of the entire proceeding. However, the Defendants fairly point out that some of the legal fees claimed are ambiguous, and questionably necessary or reasonable.

Conclusion

[22] In an effort to recognize the Defendants' contractual responsibility, and without permitting the legal fees and disbursements claim to become "unfair and unduly onerous", I believe that a lump sum award pursuant to Rule 77.08 is most appropriate. Such an award permits an amount, as a substantial indemnification,

between the full claim for “solicitor and client costs” made by the Plaintiff and the Tariff C amount argued for by the Defendant.

[23] The position taken by the Defendants, might be said to arguably be not entirely dissimilar to parties who agree to discontinue or settle a proceeding. In that respect Tariff F could be of assistance in the proper circumstances.

[24] The amount claimed here is approximately \$115,000. The Tariff F guideline suggests in such cases \$5000 +2% of \$15,000 [\$300] is appropriate. I conclude that that amount is intended to reflect a more advanced state of litigation than in the case here and therefore a lesser amount would be reasonable in the case at Bar.

[25] Tariff C, while generally applicable to successful summary judgment motions which are determinative of the preceding, is not applicable here because of the contractual arrangement between the parties indicating an intention to create an obligation of substantial, if not full, indemnification. Overarching that contractual agreement, is the requirement that the amounts claimed must have been necessary and reasonable. I accept that some of the Defendant’s criticisms of the Plaintiff’s invoices are meritorious.

[26] With all those considerations in mind, pursuant to Rule 77.08 I therefore order costs and disbursements including HST in a total amount of \$3000, on a joint and several basis.

Rosinski, J.