

SUPREME COURT OF NOVA SCOTIA

Citation: Adshade v. Auld, 2010 NSSC 35

Date: 20100128

Docket: Hfx No. 282654

Registry: Halifax

Between:

Marina Estelle Adshade

Plaintiff

v.

Gregory D. Auld, Dorothy Newcomb and
Coldwell Banker Supercity Realty

Defendants

COSTS DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: January 26, 2010 in Halifax, Nova Scotia

Decision on Costs: January 28, 2010

Counsel: Kent Noseworthy for Marina Adshade
W. Augustus Richardson, Q.C. for the defendant,
Gregory Auld
Franco Tarulli for the defendants, Dorothy Newcomb
and Coldwell Banker Supercity Realty

By the Court:

[1] The defendants successfully defended an action in negligent misrepresentation and negligence. First defendant was the lawyer who acted for the purchaser (plaintiff) on the purchase of a house. His counsel's non-suit motion was granted after one and one-half days of trial.

[2] The action against the defendant realtor and realty company was dismissed after a four day trial. At the close of my decision, counsel made submissions on costs.

[3] The defendants have been wholly successful.

Should matter have been tried in Small Claims Court?

[4] Both defendants argue the matter should have been dealt with in Small Claims Court. They say they took this position early in the proceeding. They say their position is confirmed by my provisional award of damages of just over \$17,000.00.

[5] The plaintiff's counsel says that the defendants could have transferred the matter to Small Claims Court but did not. He also says that Small Claims Court only has the jurisdiction to make general damage awards of \$100.00. I conclude that there is a question whether defendants' counsel would have made submissions at Small Claims Court to this effect. I therefore conclude the plaintiff should not be penalized in costs for bringing this action in the Supreme Court instead of Small Claims Court.

The Basis for Costs

[6] I have the discretion to make an award of costs based upon the tariffs or a lump sum award.

[7] If I use the tariff, I must determine the amount in issue. The tariffs provide:

In these Tariffs unless otherwise prescribed, the 'amount involved' shall be

...

(b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

- (i) the amount of damages provisionally assessed by the court, if any,
- (ii) the amount claimed, if any,
- (iii) the complexity of the proceeding, and
- (iv) the importance of the issues;

[8] I provisionally assessed damages of just over \$17,000.00. The response to the second defendants' offer of \$5,000.00 plus one-half of interests and costs was an all-inclusive offer of \$45,000.00 to \$48,000.00 (counsel varied about the amount and the correspondence was not in evidence). That offer included pre-judgment interest, costs and disbursements.

[9] The proceeding was not particularly complex and the issues were not, in general, of great importance, except of course to the parties. I therefore have regard to the provisional award and the amount claimed. One might consider averaging the two (net of costs, etc.) which would put the "amount involved" at under \$30,000.00. The plaintiff's pre-trial brief referred to \$17,000.00 in general damages for loss of enjoyment of her backyard, special damages of \$4,235.10 for

the cost of creating a parking space in her yard, diminution of value of her property, without specifying an amount, and the cost of acquiring parking rights from the neighbour who owned the right-of-way. The claim, while not quantified in total, would appear to be in excess of \$25,000.00 and perhaps substantially more.

[10] I conclude the amount in issue, based upon all these factors, is \$40,000.00.

As Saunders, J.A. said in *Leddicote v. Nova Scotia* (Attorney General), 2002

NSCA 47, at para 86:

[86] ... linking the ‘amount involved’ in an award of costs to the claims put forward may be a useful tool in reminding litigants of the financial risks attendant upon suing and losing.

Costs of Dorothy Newcomb and Caldwell Banker Supercity Realty

[11] An offer to settle was made by these defendants on December 15, 2009. The offer was, of course, greater than the plaintiff’s recovery. These defendants are entitled to double costs after the date of the offer. Their counsel submits two-thirds of the work in the matter was done after the offer was made. There is no substantiation of that percentage in evidence. Discoveries had already been

conducted and this defendant had retained a real estate appraiser. The pre-trial conference had been held. All in all, I conclude that two-thirds is a reasonable estimate of time spent after the offer was made.

[12] These defendants are accordingly entitled to double costs after the date of the offer. Using \$40,000.00 as the “amount involved,” costs according to Tariff A are \$6,250.00 (based upon the basic scale). Tariff A provides as well:

Tariff A

In applying this Schedule the ‘length of trial’ is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

[13] I must determine the length of trial. The trial took two full days on Monday and Wednesday, but adjourned after one-half day on both Tuesday and Thursday. I conclude the trial was in effect a three day trial. Accordingly, \$6,000.00 is to be added to the costs award, for a total of \$12,250.00.

[14] These defendants made an offer to settle which is more favourable than the plaintiff's result. They are entitled to double costs based upon two-thirds of the costs award plus regular party-party costs for the other one-third.

[15] Two-thirds of \$12,250.00 is \$8,166.00 and doubling that amount equals \$16,333.00. Adding to that one-third of \$12,250.00, \$4,083.00, results in a costs award of \$20,416.00.

[16] When making his submissions on costs, counsel for these defendants said their costs were approximately \$30,000.00. In my discretion, I conclude a costs award of more than \$20,000.00 is excessive, even taking into account the defendants' offer which was not accepted. In all the circumstances, I conclude these defendants are entitled to costs in the amount of \$16,000.00 plus disbursements.

[17] In my view, this costs award accomplishes the goal of encouraging parties to settle before trial. It rewards parties who make reasonable offers to settle and penalizes those who do not accept them.

Costs of Gregory D. Auld

[18] The action against this defendant was dismissed part way through day two of the trial. Counsel reserved the right to speak to costs at the end of the trial and did so.

[19] He, too, is entitled to costs based upon an “amount involved” of \$40,000.00. Tariff A provides for costs of \$6,250.00 plus \$2,000.00 for each day of trial. In this case, that is \$3,000.00 (1 ½ days), for a total costs award of \$9,250.00. No offer to settle was made by this defendant. A costs award of \$9,250.00, in my view, is disproportionate to the costs award to the other defendants whose costs were increased because of their offer to settle and who had 1 ½ more days of trial. Accordingly, in my discretion, I award this defendant costs of \$7,000.00 plus disbursements.

[20] In my view, these costs awards represent a substantial but not complete indemnity for the costs of the two defendants, taking into consideration all the circumstances of this matter.

[21] If the parties cannot agree about the disbursements, I will accept their written submissions on that issue.

Hood, J.