CITATION: Bentley et al v. Charters et al, 2023 ONSC 4056
COURT FILE NO.: CV-16-252
MOTION HEARD: 2023/07/07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Roberts Bentley and Carla Bentley, Plaintiffs

AND:

Peter Charters and Donna Charters, Defendants

BEFORE: The Honourable Mr. Justice D. J. Gordon

COUNSEL: Meagen J. Swan and Anthony J. Gabriele, for the Plaintiffs

J. Barry Eakins, for the Defendants

HEARD: September 19, 20, 21 and November 28, 2022

SUPPLEMENTARY ENDORSEMENT RE: COSTS

[1] In my reasons for decision, released April 17, 2023 as 2023 ONSC 2337, I invited written submissions from counsel on the issue of costs. Submissions have been received and considered.

Nature of Case

[2] This litigation resulted from a failed business venture. In 2001, the parties purchased two franchise stores in the M&M meat shops system, using a new corporation for that purpose.

[3] The business was initially profitable, turning into a loss position as a result of the unilateral changes imposed by the franchisor. Litigation was commenced and settled. The stores were sold to the franchisor for less than the original purchase price. Third party creditors, as well

as a portion of the debt owed to the plaintiffs, were paid from the closing funds, leaving $92,702 in the corporate bank account. Shareholder loans remained outstanding.

[4] The defendants removed $80,000 from the corporate bank account. This action was commenced. The plaintiffs served a motion seeking return of the funds. An order was granted to that effect. The defendants complied.

Claims

[5] This action was commenced on March 4, 2016 as an ordinary proceeding. On September 3, 2020, an order was granted for leave to amend the statement of claim and to continue this action as a simplified proceeding pursuant to Rule 76. The claims at trial were a follows, as revealed in the amended pleadings:

a) The plaintiffs sought a damage award of $100,000 and in addition, or in the alternative, the remaining funds in the corporate bank account and other relief; and

b) The defendants sought a damage award of $158,979 and general damages in an unspecified amount and other relief.

Trial Award

[6] In my decision, I directed a holdback of $20,000 to cover the expenses for winding up the corporations. I also awarded $32,939 to the plaintiffs and $39,763 to the defendants, being the remaining funds in the corporate bank account. All other claims were dismissed.

Offers To Settle

[7] The plaintiffs served several offers to settle, most recently on September 9, 2020. Judgment was less favourable. The defendants did not serve an offer to settle.

Litigation Expense

[8] Both counsel provided a bill of costs. On my review it appears both parties incurred litigation expense approaching $200,000.

Positions on Costs – Briefly Stated

[9] The plaintiffs seek a cost award of $145,319.87, inclusive of HST and disbursements, described as partial indemnity to September 2020 and substantial indemnity thereafter. Ms. Swan submits the plaintiffs made considerable attempts to resolve the dispute, including multiple offers to settle, proposing mediation and other matters yet received no response from the defendants. She refers to inappropriate conduct of the defendants, such as removing funds from the corporate bank account, delay and refusing to co-operate in the litigation. While Rule 49.10 does not apply, Ms. Swan argues the plaintiffs are entitled to enhanced costs in these circumstances.

[10] The defendants position is that no costs should be awarded given the divided success or, in the alternative, they are entitled to partial indemnity costs of $105,914.41. Mr. Eakins submits the result at trial was superior for the defendants than any of the plaintiffs offers to settle. He says the defendants litigation strategy did not reach the level of "reprehensible, scandalous or outrageous conduct" which is required for enhanced costs. Mr. Eakins

suggests the plaintiffs were motivated to force the defendants to incur significant expense by the manner in which they prosecuted their claim.

Discussion

i) Preliminary Comments

[11] This case is another example as to why litigation is considered a last resort in resolving disputes, particularly in commercial matters. The process took over six years to reach trial. The trial was only four days. And the litigation expense exceeded any reasonable prospect for recovery.

ii) Mediation Attempts

[12] The dispute between the parties developed long before the commencement of this action. They decided on mediation, requesting a mutual friend, also a former franchisee, to act as mediator.

[13] Financial information provided to the mediator was incomplete, resulting in a flawed process. The validity of the Letter of Understanding, signed in the mediation sessions, became a significant issue at trial.

[14] This litigation could have been avoided, in my view, had the parties then retained a professional mediator.

iii) General Principles

[15] The purpose of a costs award is to:

a) indemnify success litigants in some manner;

b) facilitate access to justice;

c) discourage frivolous claims or defences;

d) discourage inappropriate conduct in the case; and

e) encourage settlement.

[16] See: *George v. Landles*, 2012 ONSC 6608, for a review of general principles.

[17] The standard has long been "fairness and reasonableness", applying a contextual approach when considering relevant principles and factors. See: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

iv) Simplified Proceedings

[18] Rule 76.12.1 was an amendment in 2019, placing a limit on costs of $50,000 and on disbursements of $25,000, exclusive of HST. However, this provision does not apply to actions commenced prior to January 1, 2020.

[19] Nevertheless, the amendment is a relevant consideration as it gave formal recognition to the principal of proportionality. The parties are given to understand the application of that concept as this action was converted to a simplified proceeding in September 2020. Simplified proceedings were created, in part, to reduce litigation expense.

v) Offers To Settle

[20] The plaintiffs offers to settle do not automatically lead to enhanced costs by virtue of Rule 49.10.

[21] No offer to settle was served by the defendants. While not mandatory, it has become the accepted practice to serve such an offer. Even when a litigant anticipates complete success, a compromise offer may avoid the expense of trial. It would also form the basis for elevated costs if the result at trial are more favourable.

[22] Failure to serve an offer to settle does not, in the absence of some wrongdoing, warrant elevated costs to the other party. See: *Mortimer v. Cameron* (1994), III D.L.R. (4th) vii (S.C.C.).

vi) Elevated Costs

[23] Elevated costs may be awarded, other than in Rule 49.10, in special circumstances pertaining to the conduct of the other party, described as "reprehensible, scandalous or outrageous", "behaving in an abusive manner", brought or defended proceedings devoid of merit or unnecessarily running up costs. See: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.); and *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (Ont. S.C.J.). Elevated costs are rarely awarded, granted only to mark the court's disapproval of the conduct of a party. See: *Mortimer v. Cameron*, supra. There is a distinction between hard fought litigation that turns out to be misguided and malicious counter-productive conduct.

Only the latter warrants sanction. See*: Davies v. Clarington (Municipality)*, 2009 ONCA 722.

vii) Mixed Success

[24] As a general rule, where success is divided an award of costs will not be made. See: *Lowndes v. Summit Ford Sales*, 2006 CanLII 11654 (Ont. C.A.).

viii) Proportionality

[25] As noted in *Boucher*, supra, and *Davies*, supra, the overriding principle is reasonableness. Reasonableness leads to consideration of proportionality, now codified in Rule 1.04(1.1). Proportionately is a significant factor to be considered. See: *Marcus v. Cochrane* (2014), 317 O.A.C. 251 (Ont. C.A.); *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.); *Bailey v. Barbour* (2016), 266 A.C.W.S. (3d) 36 (Ont. C.A.); and *Cornerstone Properties Inc. v. Southside Construction Management Limited* (2020), 4 B.L.R. (6th) 191 (Ont. C.A.).

Analysis

[26] I am not persuaded the defendants conduct meets the test for elevated costs. They were entitled to defend the plaintiffs claim and to advance their counterclaim and to adopt an aggressive litigation strategy. The pleadings reflect what each of the parties considered full recovery. Several of the plaintiffs complaints regarding conduct of the case could have been addressed in motions court.

[27] The defendants retained an expert to provide opinion evidence. I declined to permit such evidence to be presented for reasons then delivered. Retaining an expert was not unreasonable.

[28] In terms of delay, the plaintiffs several pleading amendments would set off delay by the defendants in other matters. Plaintiffs control the litigation timetable in many respects and can force the defendants to trial.

[29] A subjective evaluation of reasonableness is not the standard for enhanced costs. Rather, the conduct must to reprehensible, scandalous or outrageous. That is not the case here. Rather, it was hard fought litigation well within the boundaries.

[30] The plaintiffs served several offers to settle. Failure by the defendants to accept or respond to such an offer or to serve their own cannot be the basis for elevated costs. It is suggested on behalf of the plaintiffs that the court needs to act as a gatekeeper by actively encouraging compromise and reasonableness at the very minimum of considering and responding to offers to settle when addressing costs. Such, in my view, would require an amendment to Rule 49.

[31] There has been divided success, more appropriately considered, divided failure. The ultimate award was significantly less than claimed. The plaintiffs offer brought them closer but still well short. In granting the order directing the defendants return the funds to the corporate bank account, the motions judge awarded costs in the cause. I am not prepared to re-visit that decision. Neither of the parties was sufficiently successful at trial to receive entitlement to the costs of that motion.

[32] Nothing of consequence turns on the Rule 57.01 factors. The issues were important and with some complexity, particularly regarding the prior mediation process. The amount claimed and recovered is problematic for both parties.

[33] Proportionality is a significant factor. Litigation expense exceeded the amount claimed and was approximately five times the amount recovered by each of the parties. Costs awards rarely exceed the amount recovered, particularly in simplified proceedings, unless there are unique circumstances. None exist in this case. The parties had to know their litigation expense had exceeded any reasonable amount in dispute.

[34] The plaintiffs are also subject to the provisions of Rule 57.05 as the amount they recovered was within the jurisdiction of the Small Claims Court.

[35] In all of these circumstances, I am not persuaded the parties conducted this litigation in a reasonable manner. In result, as success was divided, no costs are awarded to either of the parties.

D. J. Gordon, J.

Date: July 7, 2023

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Released: July 7, 2023