

**CITATION:** 2090950 Ontario Ltd. v. Wild Wing Restaurant Inc., 2023 ONSC 2254  
**COURT FILE NO.:** CV-14-3098-00  
**COSTS RELEASED:** April 12, 2023

**SUPERIOR COURT OF JUSTICE – ONTARIO**

7755 Hurontario Street, Brampton ON L6W 4T6

**RE:** 2090950 ONTARIO LIMITED, Plaintiff

**AND:**

WILD WING RESTAURANTS INC. and RICK SMICIKLAS,  
Defendants

**BEFORE:** Justice MCSWEENEY

**COUNSEL:** E. BISCEGLIA for the plaintiff  
(email: [ebisceglia@lawtoronto.com](mailto:ebisceglia@lawtoronto.com))

L. VITTAS for the Defendants  
(email: [lsv@gzlegal.com](mailto:lsv@gzlegal.com))

**HEARD:** Cost submissions April 6, 2023

**ENDORSEMENT – RULING ON COSTS FOLLOWING TRIAL**

[1] On April 6, 2023, I heard costs submissions from the parties following oral delivery of my judgment and reasons following this four-day summary trial. This is my ruling on costs.

[2] Trial Judgment was granted in favour of the Plaintiff as follows:

1. the Defendant, Wild Wing Restaurants Inc., shall pay damages for breach of lease to the Plaintiff, 2090950 Ontario Limited, in the amount of \$334,484.56, with pre- and post-judgment interest payable on that amount at the rate of 18% per annum from July 8<sup>th</sup>, 2014.
2. the Defendant, Rick Smiciklas is personally liable to the Plaintiff pursuant to section 50 of the *Commercial Tenancies Act*. Judgment for

\$20,000 payable to the Plaintiff by Rick Smiciklas from July 8<sup>th</sup>, 2014 pre- and post-judgment interest payable on that amount pursuant to the *Courts of Justice Act*.

### **Legal Framework on Costs**

[3] The civil cost framework is not in dispute. Rule 57.01 of our Rules of Civil Procedure sets out the factors that the court may consider when determining costs. The relevant factors are:

- (a) the result in the proceeding,
- (b) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (c) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (d) the amount claimed and the amount recovered in the proceeding;
- (e) the complexity of the proceeding;
- (f) the importance of the issues;
- (g) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

[4] Costs awards, at the end of the day, should reflect “what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties”: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24

[5] With respect to the outcome of the trial, while judgment was granted as set out above, the claims dismissed included the defendants’ set-off defence that the Plaintiff failed to mitigate its damages; and dismissal of Plaintiff’s claim that the court should pierce the corporate veil and find personal liability against defendant Smiciklas for the value of a rent cheque he wrote to the landlord and on which he subsequently stopped payment (close to \$10,000 amount).

[6] The Plaintiff was overall substantially successful and is presumptively entitled to costs. Plaintiff’s full recovery costs are \$29,493.00 (fees including HST); and a total of \$2,134.96 for disbursements. Its fees at partial indemnity total \$17,695.80.

[7] Defendants did not dispute the elevated scale of costs to which the Plaintiff is entitled pursuant to the terms of the parties’ lease, for the costs to recover damages for rent owing under the lease. In addition, both counsel submitted, and I agree, that partial indemnity is the appropriate scale for the part of the Plaintiff’s costs related to the personal liability issues.

[8] With respect to Plaintiff's counsel's hourly rate, hours and disbursements, the Defendant does not take issue with those items. I agree those are reasonable and that Plaintiff's senior counsel appropriately allocated work to lower-cost colleagues where appropriate.

[9] Defendant counsel submits, however, that the Plaintiff's costs should be reduced somewhat to take into account the additional work required of the Defendants to meet the "personal liability" claim against the individual Defendant, which was a claim for over \$300,000 damages, until the Plaintiff reduced the claim against him to just under \$30,000 on the eve of trial.

[10] They also ask the Court to make two separate cost orders: one against the corporate defendant only, and one apportioning a smaller amount of costs joint/several against Mr. Smiciklas and the corporate defendant. Counsel argues that the Court should depart from the usual "joint and several" costs term on the basis that personal recovery against Smiciklas was only \$20,000 of the total of over \$354,000 damages awarded.

[11] The parties confirmed that neither party exceeded an offer to settle to entitle it to an award of elevated costs per the *Rules*. The defendants acknowledge the Court's broad discretion to make such costs order as it deems appropriate in all the circumstances.

[12] I find the Plaintiff's hourly rates, steps taken and disbursements very reasonable if not modest in the circumstances. The issues were not complex, but the factual detail in the evidence was extensive. Certainly, the result was of importance to both parties. I note also with appreciation that the preparation and approach taken by both counsel to narrow and focus the issues at the start of the trial was of assistance to the court at trial.

[13] With respect to the "lease damages" issues and the "personal liability" issues, as they were distinguished at trial and in my reasons for decision, in my view each category of issues took approximately half of the Court's trial time and attention in evidence and argument. I therefore consider it appropriate in the circumstances to award the Plaintiff 50% of its hours claimed for the lease damages issues, calculated at a full indemnity rate. This amount is \$14,743.50, inclusive of HST.

[14] The other 50% of hours claimed are awarded at partial indemnity rate, as costs of the personal liability issues, which is \$8,851.80. From that amount I have deducted \$1000.00 (\$885.00 fees plus HST) in consideration of the outcome on the corporate veil issue and the late abandonment by the Plaintiff of a significant claim against the individual defendant. This amount is therefore \$7,851.80.

[15] Disbursements are awarded to Plaintiff in amount claimed, being \$2,134.96 inclusive of taxes.

[16] Total costs ordered inclusive of disbursements and taxes are, calculated by adding the three preceding paragraphs together; \$24,720.26.

[17] I have considered the factors set out above, the arguments of counsel, and the cost outlines filed. Having done so, I fix costs in the amount of \$24,720.96, inclusive of fees, disbursements and applicable taxes (ie. The total of the three previous paragraph amounts).

[18] In considering the amount awarded to be fair and reasonable, I also considered its fair proportionality to the value of the judgment granted.

[19] I have also considered the costs ordered to be an amount that the unsuccessful Defendants would reasonably have expected to pay. I make this last observation on the basis of the cost outline filed by the Defendants. It was not their costs of the action – another counsel represented them for much of the 8+ years since the action was commenced in 2014 – but their trial costs only. If successful, the Defendants' outline indicates its trial costs were \$10,023.30 partial indemnity and \$16,705.50 at full indemnity (plus HST, plus modest disbursements). That amount is very similar to the trial costs portion of the Plaintiff's costs outline, and therefore commensurate with what the Defendants would have expected to pay if unsuccessful.

[20] I have considered the Defendants' request to allocate costs as between them. In declining to do so, I consider that the litigation for the Defendants was

directed by Mr. Smiciklas on his own behalf and on behalf of his solely-owned corporation. As a result, all legal steps taken, and resulting legal fees incurred by the Plaintiff to achieve its result, required it to reckon with the position and instructions of the jointly represented Defendants. Both Defendants alleged failure to mitigate lack of success of their position resulted in an award of over \$334,000 to the Plaintiff.

[21] In other words, the Defendants, their interests, and their common defence were so intertwined that I decline to depart from the usual approach with regard to joint and several liability for costs.

**Conclusion:**

[22] In the result, for the reasons above, I order costs of the action payable jointly and severally by the defendants, Wild Wing Restaurants Inc. and Rick Smiciklas, to the Plaintiff 2090950 Ontario Limited, in the amount of \$24,720.96. Post-judgment interest pursuant to the *Courts of Justice Act* shall be calculated from the date of judgment April 6, 2023.

[23] So ordered.

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McSweeney J.

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