

CITATION: Empire Steel Inc. v. 2469521 Ontario Inc., 2024 ONSC 60
COURT FILE NO.: CV-23-80466
DATE: 2024/02/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Empire Steel Inc. and Steelserve Corp

Plaintiffs

- and -

2469521 Ontario Inc., DBA Dass Metal
Products & Dass Steel Service Centre,
2835085 Ontario Inc., John Doe
Corporation, Jaswant Dass, Preet Dass
and Navjot Dass

Defendants

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)
) Sam Gebrael, Counsel for the Plaintiffs
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) Jonathan Chen and Nikolas De Stefano,
) Counsel for the Defendants
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)

) **HEARD:** November 24, 2023
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THE HONOURABLE JUSTICE M. BORDIN

DECISION ON COSTS

Overview

- [1] Both parties seek partial indemnity costs arising out of the defendants' *Rule* 21.01(1)(b) and *Rule* 25.11 pleadings motion. The plaintiff seeks \$22,759.95 inclusive of disbursements and HST and the defendants seek \$11,940.26 inclusive of fees and HST. Both parties assert they were the successful party on the motion. In the alternative, the plaintiffs say that costs should be in the cause because of "the mixed success".
- [2] The plaintiffs say they were both "successful in defending the motion" and they admit that they were "not entirely successful in defending the motion" because the defendants were successful in some of the relief sought.

- [3] The plaintiffs point to changes between two iterations of the notice of motion to support their argument that the plaintiffs were successful in defending the motion. The motion was argued based on the notice of motion and materials before the court, notwithstanding what may have come before.
- [4] The plaintiffs were not successful on the motion before me. The claims of conspiracy against all defendants, negligent misrepresentation against the individual defendants, and declarations for breach of court order were struck out without leave to amend. The claims of fraud, conversion, unjust enrichment and oppression were struck with leave to amend. The allegation that the corporate veil should be pierced was held to be sufficiently pleaded.
- [5] The plaintiffs say that they were successful in part because leave to amend was granted. Leave to amend does not mean the plaintiffs can sufficiently plead the causes of action for which leave to amend was granted. Rather, the plaintiffs are simply afforded a further opportunity to attempt to do so. In any event, it remains that the statement of claim that was before the court was deficient, necessitating the motion. The plaintiffs' Proposed Claim (as defined in my reasons on the motion) did potentially address *some* of the pleading issues, but not all.
- [6] In short, success was divided, but the defendants were successful on much of the relief they sought.
- [7] The plaintiffs rely on *1672736 Ontario Inc. v. Savini*, 2023 ONSC 5979 in support of their claim for costs. *Savini* is distinguishable. The plaintiff in *Savini* was awarded costs because the plaintiff was entirely successful in defending the motion; the pleading motion was dismissed.
- [8] The defendants were substantially successful on their pleadings motion and are entitled to costs. The statement of claim was, as set out in my reasons, flawed. Among other things, it failed to delineate the allegations with respect to the contract and breach of contract allegations from the fraudulent scheme allegations. As a result, the claim was difficult to parse, leading to pleading deficiencies. The defendants' motion was necessary, even in the face of the Proposed Claim.
- [9] I agree with Justice Perrell in *Stedfasts Inc v Dynacare Laboratories*, 2020 ONSC 263 at para. 6 that the losing party on a motion to strike a pleading ought to reasonably expect that he or she will have to pay for the education when leave to amend the pleading is granted.
- [10] I reject the plaintiffs' submission that costs should be in the cause. The plaintiffs rely on *MacDonald v Ford*, 2015 ONSC 5773 in support of their position. *MacDonald* does not support the plaintiffs' position. *MacDonald* concerned costs on a motion to strike a claim as statute-barred, not a pleadings motion. I see no basis to depart from *Rule 57.03 (1)* which requires that costs of a contested motion

shall be ordered to be paid within 30 days unless the court is satisfied that a different order would be more just.

- [11] Subject to the provisions of an Act or the rules of this court, costs are in the discretion of the court: s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising that discretion, I may consider, in addition to the result in the proceeding and any offer to settle, the factors enumerated in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.
- [12] Fixing costs is not a mathematical exercise of multiplying hourly rates by the amount of time spent. Assessing the appropriate quantum of costs requires a consideration of what is fair and reasonable for the unsuccessful party to pay in the circumstances: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).
- [13] A costs award should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.
- [14] The defendants were substantially, although not entirely successful, on their motion. The costs sought by the defendants are half of those of the plaintiff. The time incurred by the defendants was reasonable. The rates sought by the defendants are somewhat high given the year of call of counsel. The defendants seek costs for two counsel attending the hearing which was not required on a pleading motion of this nature.
- [15] Having considered all the above, I find the following is fair and reasonable. The plaintiffs shall pay costs to the defendants fixed in the amount of \$8,000 plus HST. The costs are payable within 30 days.

Bordin J.

Released: February 6, 2024

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