

CITATION: Metro 1 Development Corp Ltd. et al v. Michael Garron Hospital,
2024 ONSC 980

COURT FILE NO.: CV-22-00691620-0000

DATE: 20240214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: METRO 1 DEVELOPMENT CORPORATION LTD., 8441553 CANADA LTD.
cob COFFEE HOUSE, and 1916179 ONTARIO LTD. cob ATHEN’S BAKERY
Plaintiffs

AND:

MICHAEL GARRON HOSPITAL (MGH) formerly known as TORONTO EAST
GENERAL HOSPITAL Defendant

BEFORE: Cavanagh J.

COUNSEL: *Gary M. Caplan and Aram Simovonian*, for the Plaintiffs (Moving Parties)

Alexander Melfi, for the Defendant (Responding Party)

IN WRITING

COSTS ENDORSEMENT

- [1] The Defendant Michael Garron Hospital (“MGH”) seeks an order for costs of a motion by the Plaintiffs for a determination of their rights as head tenant and sub-tenants in connection with a written lease agreement made between the Plaintiff Metro 1 Development Corporation Ltd. (“Metro”) as tenant with MGH as landlord. The other Plaintiffs are subtenants of Metro.
- [2] The Plaintiffs’ motion was dismissed.
- [3] MGH seeks costs of this motion on a substantial indemnity scale in the amount of \$73,034.95.
- [4] MGH submits that costs on an elevated scale should be awarded on the ground that the Plaintiffs made unfounded allegations of bad faith conduct by MGH in the manner it dealt with the Plaintiffs and in the manner in which MGH presented its evidence to the Court. MGH also relies on an offer to settle (which was not accepted) dated January 20, 2023 by which, among other things, MGH offered that Metro 1 could continue to operate the Coffee House until October 23, 2023, that MGH and Athens Pastries would enter into a new lease on the same terms as the Lease Agreement at issue (with a few exceptions), and that the Plaintiffs’ action would be dismissed without costs.

- [5] I do not agree that the Plaintiffs engaged in conduct in this litigation that qualifies as reprehensible and justifies an award of costs on an elevated scale. The offer to settle does not trigger costs consequences under rule 49.10 of the *Rules of Civil Procedure* that entitle MGH to an award of costs on a substantial indemnity scale.
- [6] MGH is entitled to costs of this motion on a partial indemnity scale.
- [7] MGH seeks costs on a partial indemnity scale in the amount of \$49,595.65 comprised of fees of \$41,485.50, HST on fees of \$5,393.12, disbursements of \$2,410.55 and HST on disbursements of \$306.48. The Bill of Costs of MGH for the motion describes the activities for which legal services were provided as a single block description. The hours expended are not shown by reference to particular activities. As a result, I am unable to identify who performed the tasks and I am unable to assess the reasonableness of the time expended for particular tasks.
- [8] The Plaintiffs submit that the hours claimed by MGH for four lawyers (124.5 hours) plus time spent by law clerks, is unreasonable, unfair, excessive and disproportionate. They rely on their own Bill of Costs for this motion in which, on a partial indemnity scale, shows costs of \$30,391.35 comprised of fees of \$25,600 (based on 87.7 hours) together with HST and disbursements.
- [9] In *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579, at para. 26, the Court of Appeal held that the fixing of costs is not a mechanical exercise and, overall, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.
- [10] This motion was important to the parties. It raised issues of moderate complexity. The Plaintiffs relied on two affidavits and three motion records. MGH relied on two responding affidavits. There were three days of cross-examinations. The hearing was conducted over ½ day.
- [11] When I consider the factors in rule 57.01 and the principle in *Boucher*, I fix costs to be paid by the Plaintiffs to MGH in the amount of \$40,000 all-inclusive. This amount is fair and reasonable and within a range of costs that the Plaintiffs would reasonably expect to pay if their motion was unsuccessful.

Cavanagh J.