

CITATION: Filler Depot v. Copart Canada Inc., 2024 ONSC 2572
COURT FILE NO.: CV-22-00690636-0000
DATE: 20240502

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FILLER DEPOT, Plaintiff
AND:
COPART CANADA INC., Defendant
BEFORE: VERMETTE J.
COUNSEL: *Shahryar Mazaheri*, for the Plaintiff
Adam Raikes, for the Defendant
HEARD: In writing

ENDORSEMENT AS TO COSTS

[1] On January 22, 2024, I released an endorsement (2024 ONSC 466) granting the Defendant's motion to strike and ordering the Plaintiff to deliver a Fresh as Amended Statement of Claim.

[2] The parties were not able to agree on costs and have delivered costs submissions.

Positions of the parties

a. Position of the Defendant

[3] The Defendant asks for costs on a substantial indemnity basis in the amount of \$15,000.00.

[4] The Defendant states that it is presumptively entitled to its costs, having been wholly successful on the motion. It submits that there is no reason to depart from the ordinary rule.

[5] The Defendant argues that costs on a substantial indemnity basis are appropriate in this case for the following reasons:

- a. The Defendant submits that the stakes were high. It states that it was unable to provide a full answer and defence to the Statement of Claim because the claim was radically deficient, and that the Statement of Claim created substantial obstacles for efficient discovery.

- b. The Defendant argues that the Plaintiff conducted itself unreasonably by refusing multiple requests to amend its claim voluntarily and to provide its availability for a hearing.
- c. The Plaintiff filed its motion materials very late.
- d. The Plaintiff filed evidence that was inadmissible and/or irrelevant on the motion.
- e. The Defendant states that the Plaintiff's amended materials did not properly identify the amendments thereto, such that the Defendant was put to undue expense of identifying the changes.
- f. The Defendant submits that the Plaintiff relied on non-binding and non-persuasive authorities.

[6] The Defendant also relies on a Rule 49 offer to settle that it served on October 23, 2023, i.e., two weeks prior to the hearing of the motion. The Defendant argues that it attained the same result or beat the offer and, accordingly, is entitled to a higher scale of costs.

[7] The terms of the offer to settle are as follows:

1. The Plaintiff shall agree to an Order:
 - (a) Striking the following paragraphs, subparagraphs, and header, with leave to amend:
 - (i) Paragraphs 1ii), 1iv), 1v), 1vi), 1ix), 12, 21, 22, 23, 24, 26, 28, 29, 30, 31, 32, and 33, and
 - (ii) Striking the header between paragraphs 28 and 29.
 - (b) Granting leave to the Plaintiff to amend the Statement of Claim to address the deficiencies set forth in subparagraph (a) of this Offer to Settle, which shall be served and filed within 30-days [sic]. If the Plaintiff fails to do so, the Defendant may proceed to defend the claim as if these allegations remain struck.
 - (c) Granting the Defendant 30-days [sic] from being served with the Amended Statement of Claim, or from the last day in which the Plaintiff has leave to serve and file an amended claim, to serve and file its defence.
2. The Plaintiff shall pay to the Defendant its costs of this motion fixed at \$4,000.00, inclusive of disbursements and taxes, payable in 30-days [sic].

3. This Offer to Settle expires one (1) minute after the commencement of the motion.

[8] The Defendant submits that considering the importance of the issues, the quality and lateness of the materials and submissions, the ultimate result, and its Rule 49 offer, substantial indemnity costs and disbursements of \$15,000.00 payable within 30 days are fair and reasonable.

[9] In the alternative, the Defendant requests costs in the all-inclusive amount of \$13,000, reflecting a partial indemnity rate until the offer to settle was extended, and a substantial indemnity from the date of offer to the hearing. In the further alternative, the Defendant requests its costs on a partial indemnity basis, fixed at \$11,000.00, inclusive of HST and disbursements.

b. Position of the Plaintiff

[10] The Plaintiff submits that the Court should not make a costs award and should allow for the action to be settled. In the alternative, the Plaintiff argues that the Defendant's costs are grossly exaggerated. Its position is that costs should be awarded in the cause or on a partial indemnity basis.

[11] The Plaintiff states that the Defendant did not take any steps to settle the matter without a need for adversarial process. The Plaintiff further states that the Defendant refers in its submissions to communications that were without prejudice and are inadmissible. The Plaintiff also complains that the Defendant's costs submissions include material and correspondence that were not included in the Motion Record and argues that such material and correspondence are inadmissible.

[12] The Plaintiff submits that the time spent by the Defendant's lawyer involves duplication and excessive time recording. It states that the Defendant accounts for time spent prior to the hearing and that such costs should go to the costs of the action. The Plaintiff argues that the costs are not proportionate to the motion, which object was to narrow down the issues. The Plaintiff's position is that the costs should be within a range of \$5,000.00 to \$7,000.00.

[13] The Plaintiff complains that the motion was scheduled without canvassing the availability of the Plaintiff's counsel, and that there was no timetable allowing a reply factum. The Plaintiff argues that it did not ignore the request to amend, but, rather, consistently engaged in communications to move the matter forward.

[14] The Plaintiff's costs outline shows 17.5 hours in time spent (15.5 of which are time spent by a lawyer) and costs on a partial indemnity basis in the amount of \$4,680.94 (inclusive of disbursements and HST).

Discussion

a. Entitlement to costs

[15] The Defendant was the successful party on the motion. It is entitled to costs. Rule 57.03 of the *Rules of Civil Procedure* provides that on the hearing of a contested motion, the court shall fix the costs of the motion and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just. There is no valid reason in this case to order costs in the cause. The Plaintiff was given the opportunity to amend its Statement of Claim before the motion, and it declined to do so. It should be liable to pay the costs of the motion.

b. Scale of costs

[16] As has been observed in many cases, costs on an elevated scale are exceptional and are reserved for those situations when a party has displayed reprehensible, scandalous or outrageous conduct: see *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*, 2021 ONCA 287 at para. 4. Although there were issues with respect to the manner in which the Plaintiff responded to the motion, it is my view that the conduct of the Plaintiff in this case does not rise to the egregious level required to award costs on an elevated scale. Therefore, the appropriate scale of costs is partial indemnity.

c. Offer to settle

[17] In evaluating an offer to settle that includes costs, the proper test is to analyze the amount recovered (including costs) up to the date of the offer to settle: see *2287913 Ontario Inc. v. ERSP International Enterprises Ltd.*, 2022 ONSC 1579 at para. 30. Rule 49 has been found not to apply to an offer that includes a fixed amount for costs instead of costs as assessed if there is some difficulty arising from the assessment of costs as of the date of the offer. See *Oskar v. Chee*, 2012 ONSC 2939 at para. 12 and *Brown v. Township of Ignace*, 2010 ONSC 348 at paras. 11-13.

[18] In this case, the Defendant's costs outline shows that the Defendant's costs on a partial indemnity basis at the time the offer to settle was served were not substantially higher than \$4,000.00. Given my conclusion below that a reduction should be applied to the quantum of costs sought by the Defendant, I cannot conclude, evaluating the offer to settle as of the date of the offer, that the Defendant's offer was more favourable than the amount recovered. Consequently, I find that the Defendant has not discharged its burden under Rule 49.10(3) and that the costs consequences in Rule 49.10 are not triggered.

d. Quantum

[19] I have reviewed the Defendant's costs outline. I accept the Defendant's submission that, as a result of the conduct of the Plaintiff (including the very late service of materials and the reference to inadmissible evidence), more time had to be spent than would have normally been necessary. Further, the Defendant had to address many different causes of action in its Factum.

[20] Nevertheless, I find that it is appropriate to apply a reduction to the costs sought by the Defendant to ensure the overall reasonableness of the costs award in light of all the circumstances of the case, including the type of motion in issue. In my view, the appropriate amount of costs on a partial indemnity basis in this case is \$9,000.00.

e. Other complaints raised by the Plaintiff

[21] I find the other complaints raised by the Plaintiff in its costs submissions to be generally unfounded. Among other things, the correspondence clearly shows that counsel for the Plaintiff was consulted with respect to the completion of the form to request a motion date. Further, the correspondence that was included in the Defendant's materials does not appear to me to be "without prejudice" and protected by settlement privilege.

Conclusion

[22] Taking the foregoing into account, as well as the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure* and the reasonable expectations of the parties, I find that the fair and reasonable award of costs in favour of the Defendant is on a partial indemnity basis in the all-inclusive amount of \$9,000.00. In my view, this is an amount that the Plaintiff should reasonably have expected to pay in the event that it was unsuccessful on the motion. The costs are to be paid by the Plaintiff to the Defendant within 30 days.

Vermette J.

Date: May 2, 2024