

CITATION: Tataryn v. Diamond & Diamond., 2024 ONSC 230
COURT FILE NO.: CV-18-00598032-00CP
DATE: 20240111

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WILLIAM TATARYN and DAYA NAND RAJAN, Plaintiffs

– **AND** –

DIAMOND & DIAMOND LAWYERS LLP, Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Peter Waldman*, for the Plaintiffs

Milton Davis, Ronald Davis, and Teodora Obradovic, for the Defendant

HEARD: Costs submissions in writing

COSTS OF MOTION TO DISMISS

[1] On November 1, 2023, I dismissed this proposed class action on the grounds that the Plaintiffs had delayed the proceeding beyond the time permitted by section 29.1 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”). In doing so, I noted that the case began with the issuance of a Notice of Application in May 2018 and had gone through a long series of motions and amendments in making its way through the pleadings stage.

[2] The Defendant now seeks costs of the entire action on a substantial indemnity scale. They submit that the claim alleges professional misconduct on the part of the Defendant, and that, like an allegation of fraud, that allegation attracts an elevated scale of costs if pleaded but not proven. Counsel for the Defendant have submitted a Bill of Costs in which the total amount, including disbursements and tax, comes to \$338,876.27 on a substantial indemnity basis.

[3] Counsel for the Plaintiffs submits that this is excessive. They point out that the costs of prior stages in this action were for the most part subsumed in, and already addressed by, the costs rulings on previous motions. They also submit that the dismissal was not a summary judgment on the merits, but rather was a dismissal for delay. That kind of motion, according to Defendant’s counsel, does not call for a fixing of costs for the entire action or an elevated scale of costs.

[4] The Plaintiffs’ own Bill of Costs comes to \$49,256.99 for the same steps in the litigation.

[5] The general principles governing the fixing of costs are well known. Section 131 of the *Courts of Justice Act* establishes a broad discretion for the Court in awarding costs. Rule 57.01 of the *Rules of Civil Procedure* sets out a list of factors which can be taken into account in determining the amount of costs. The overarching policy is to fix an amount that is fair, reasonable, proportionate, and within the parties' reasonable expectations: *Boucher v. Public Accountants of Ontario*, 2004 CanLII 14579 (Ont. CA).

[6] Under the circumstances, I am not inclined to award costs on a substantial indemnity basis. Plaintiffs' counsel did nothing in responding to this motion that would call for an elevated scale of costs. He responded to the motion as any lawyer would. Unfortunately for his client and him he was unsuccessful, but that in itself calls for partial indemnity costs, not substantial indemnity costs.

[7] I also am not inclined to award costs for steps in the action other than the motion before me. It is unclear to me what has already been the subject of costs awards and what has not.

[8] Defendant's counsel have broken down the amount claimed according to each stage of the proceedings. Their Bill shows that, using round numbers, they incurred \$90,000 in partial indemnity costs for the motion for delay. They have also incurred disbursements in the total amount of \$30,877.50, most of which is attributable to the fees paid to a mediator for a two-day session. While the mediation took place prior to the delay motion and was not related to the motion, it does seem right to have Defendant's counsel get reimbursed for this out-of-pocket expense now that the action is at an end.

[9] Again using a rounded off figure, Plaintiffs shall pay the Defendant costs in the all-inclusive amount of \$125,000 in costs.

Date: January 11, 2024

Morgan J.