CITATION: 1917196 Ontario Ltd. v. Kazmi, 2023 ONSC 7284
COURT FILE NO.: CV-18-594953
DATE: December 29, 2023

2023 ONSC 7284 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act,* R.S.O. 1990, c.C.30

B E T W E E N:

1917196 ONTARIO LTD. o/a SAVE ON CONTRACTING

Plaintiff

Noorullah Kamil for the plaintiff,
Tel.: 647-229-3444,
Fax: NA,
Email: Noorullah.kamil@gamil.com,

-and-

SADAF KAZMI, SHAZIA TAREEN, TASNEEM ZAHIR and ADNAN BASHIR

Defendants

Robert J. Kennaley for the defendants;
Tel.: 519-805-8186,
Fax:: 519-426-3777,
Email: rjk@kennaley.ca.

DECISION: January 14, 2023.

Associate Justice C. Wiebe

COSTS AND INTEREST DECISION

[1] On January 14, 2023 I issued my Reasons for Judgment in this action. I dismissed the Save On claim including its damage claim of $45,017, discharged its claim for lien in the amount of $225,704, ordered that Save On pay the defendants $517,454.66 in damages concerning their counterclaim for $594,263.14 in damages, and ordered that the $80,000 of project security the defendants had posted with Tarion and that I ordered on October 14, 2021 on consent be paid into court, be returned to the defendants with all accrued interest thereon.

COSTS

[2] As noted in my Reasons, the parties filed costs outlines for this action at the hearing. The defendants' costs outline showed $232,238.42 in partial indemnity costs, $269,231.42 in substantial indemnity costs and $298,150.90 in actual costs. Included were costs for the defendants' initial lawyer, Salma Sheikh. Save On's costs outline showed one figure, namely fees and disbursements on a full indemnity basis in the total amount of $99,088.55. The document described this amount as pertaining only to Save On's lawyers, and showed a total of 200.83 hours in lawyers' time. The document also showed 120 additional hours for Save On's principal, Noorullah Kamil, for the period during which he represented Save On.

[3] The defendants stated in closing argument that in the event of success they would be seeking a costs order against both Save On and its principal, Noorullah Kamil. As a result, in my Reasons I scheduled a trial management conference to take place on February 7, 2023 for the purpose of scheduling an oral hearing on costs. I advised Mr. Kamil to obtain legal representation concerning the costs issue.

[4] The trial management conference was adjourned to March 16. 2023. At that time a lawyer, David Yudashkin, appeared for Save On and Mr. Kamil. I scheduled an oral hearing as to costs and interest for May 15, 2023, and imposed a schedule for that hearing. On April 20, 2023 Mr. Yudashkin emailed the court, copying Mr. Kennaley, advising that Mr. Kamil's daughter passed away a few days earlier and that Mr. Kamil could not assist Mr. Yudashkin in meeting the schedule as a result. He suggested that the hearing be moved to dates in June, 2023. I adjourned the hearing to June 12, 2023 and revised the schedule accordingly.

[5] On April 3, 2023 the defendants filed their written trial costs submission and a revised costs outline. The revised costs outline showed $276,199.86 in substantial indemnity costs and $314,199.11 in actual costs. On May 23, 2023 Mr. Yudashkin served the Save On written costs submissions, which attribute authorship to Mr. Kamil. Save On did not file an updated costs outline.

[6] On June 12, 2023 Mr. Kennaley appeared to argue for the defendants. He argued that the defendants should be paid the substantial indemnity costs shown on the defendant's updated costs outline, namely $276,199.86. He argued that this amount should be paid by both Save On and Mr. Kamil personally. Mr. Kamil, not Mr. Yudashkin, appeared to argue for Save On and Mr. Kamil. He did not seek costs and argued that there should be no costs awarded against either Save On or himself personally.

[7] My jurisdiction concerning costs is governed by *Construction Act,* R.S.O. 1990, c.C.30 ("*CA*"), section 86. The old version of the *CA* section 86 applies to this case, as the contract in question predated July 1, 2018. The reference to *CA* in this decision refers to the old *CA*.

[8] Section 86 gives the court broad discretion to award costs, including the discretion to award costs against a party or a person who represented a party, and a discretion to award substantial indemnity costs. Section 86(2) limits this discretion by requiring that an award of costs not exceed

2023 ONSC 7284 (CanLII)

what the party awarded costs would have incurred in costs by taking the least expensive course of action.

[9] In exercising this discretion on costs, the court can and should have regard for the factors listed in Rule 57.01(1). In accordance with *CA* section 67(3), the *Rules of Civil Procedure* apply to this case to the extent they are not inconsistent with the *CA*. The Rule 57.01(1) factors are not inconsistent with *CA* section 86, subject of course to the restriction of *CA* section 86(2).

2023 ONSC 7284 (CanLII)

Result

[10] I will, therefore, apply *CA* section 86 and the relevant Rule 57.01(1) factors. The first and foremost factor is the result of the proceeding. There is no doubt that the defendants are the successful party. This is not disputed. I find as a result that the defendants deserve costs. The question is the quantum of the costs award.

Offers to settle

[11] Mr. Kennaley's written submission disclosed the offers to settle that the parties made. On April 22, 2022 Save On offered to accept $246,500. This was essentially the entirety of the Save On claim plus an amount for costs.

[12] On May 7, 2022, three days before the commencement of the trial hearing, the defendants made a written offer to settle whereby the defendants offered to accept $36,000 from the $56,000 Save On posted as security for the defendants' counterclaim pursuant to my order of April 12, 2022 and return the rest to Save On, and whereby the defendants' $80,000 of project security in court be returned to them, and whereby the Save On claim would be dismissed and claim for lien discharged with the posted lien security returned to the defendants. In short, this offer was almost a complete "walk away" offer, namely one where both sides abandon their claims.

[13] Save On responded on May 10, 2022, the first day of the hearing, by reducing its offer to a requirement that the defendants pay Save On $164,000. No further offers were made.

[14] Clearly, the defendants' offer was the most reasonable. The defendants succeeded at trial well in excess of what they offered on May 7, 2022. They defeated the entirety of the plaintiff's claim and obtained a judgment for about 87% of their counterclaim. Given the poor quality of the plaintiff's evidence, I am frankly astounded that Save On did not accept the defendants' offer. This is an area where seasoned counsel would have assisted the plaintiff.

[15] While the defendants' offer was not one that fell under Rule 49.10, and while the mandatory aspects of Rule 49.10 do not apply in any event given the breadth of the costs discretion in *CA* section 86, the court should consider this rule as it is designed to promote settlement and reasonable conduct in settlement discussions. One of the goals of a costs award is to promote settlements; see *Kalogon Spar Ltd. v. Papageorge,* 2020 ONSC 3234 at paragraph 25.

[16] Under Rule 49.10, a plaintiff that obtains a result that exceeds its offer, is entitled to partial indemnity costs to the date of the offer and substantial indemnity costs thereafter. The defendants are the plaintiffs-by-counterclaim in this action and clearly obtained a result that exceeded their offer.

[17] Using this rule as a guide, I find that the defendants should be awarded substantial indemnity costs after May 7, 2022, the date of their offer.

[18] What are those costs? The defendants' costs outline shows that the defendants incurred $57,731.70 in actual lawyer fees after their offer. 90% of this is $51,958.53, which represents the substantial indemnity amount. Adding the disbursements that appear to pertain to the period after the offer, namely $3,958.70, and that total rises to $61,690.40.

[19] Whether the defendants get the full quantum of those costs will be discussed later. I will now turn to the issue of whether the defendants should get partial indemnity or substantial indemnity costs from Save On for the period prior to their offer.

Conduct

[20] *CA* section 86(1) states that the court may make an award of substantial indemnity costs against a party. In my costs decision in *New Generation Woodworking Corp. v. Arviv,* 2021 ONSC 2184 at paragraph 14, I indicated that the test in *CA* section 86(1)(b) for finding a representative of a party personally liable for costs, would certainly justify an award of substantial indemnity costs against the party itself if successfully applied against the party. That only makes sense because the test requires establishing conduct that is abusive and tantamount to fraud, namely that the party pursued a claim for lien that it knew was without foundation and prejudiced and delayed the conduct of the action.

[21] In general, I note that courts have been reticent about awarding substantial indemnity costs. They are awarded only when there has been "reprehensible, scandalous or outrageous conduct"; see *Kalogon, op. cit.* at paragraph 36. I bear this in mind as well.

[22] The evidence indicated to me that Save On knew all along that its claim for lien was without foundation. In my Reasons I found that the contract term on which Save On anchored its claim was not ambiguous at all. It did not impose on Mr. Bashir any requirement to post builder security as alleged by Save On. The most telling document, in my view, was the email Mr. Kamil sent to Mr. Bashir on September 9, 2016, some ten days after the contract was signed. In this email Mr. Kamil reported in detail on the status of Save On's registration application and the security Save On was posting. There is no mention of any obligation on Mr. Bashir to post builder security. This was two months before the problems Save On started having with the registration process, problems Mr. Kamil tried at trial to use to justify Save On's failure to pursue Mr. Bashir for his builder security. This claim lacked any credibility.

[23] The first time Save On raised the builder security issue was on Jun 1, 2017, nine months after the contract was signed. The project was nearing completion and was enrolled with Tarion. Mr. Kamil emailed on June 1, 2017 suddenly demanding replacement builder security from Mr. Bashir and threatening the higher contract price if it was not provided. The reason for this change in direction became clear on October 31, 2017 when Mr. Kamil emailed Mr. Bashir and Ms. Zahir stating, "I am underpriced in this project and cannot finance the project without payment." There was then the Save On invoice of January 5, 2018 for an extra for the unilaterally revised contract price at $165 per square foot and Save On's unilateral decision later that month to withdraw services, threatening the claim for lien and leaving the defendants with an unfinished project. I am satisfied from the evidence that Save On fabricated this lien claim for an extra to extract more

2023 ONSC 7284 (CanLII)

money on a project it had underestimated. Such abusive conduct merits the sanction of substantial indemnity costs.

[24] I am also satisfied from the evidence that Save On prejudiced and delayed the conduct of this action. The following are my reasons:

- The Save On kept critical information from me. During the closing oral submissions on costs, Mr. Kamil volunteered the information that he suffers from a diagnosed medical condition called "attention deficit, hyperactivity disorder" or ADHD. I take judicial notice that this condition causes impulsive behavior, hyperactivity and lack of focus. Mr. Kamil raised this point no doubt to garner my sympathy. However, he never raised this point with me at the time of the Save On motion on April 11, 2022 for leave to have Save On represented by Mr. Kamil. Had I known of this condition at that time, as I should have known, I would have been quite reluctant to grant the leave. With Mr. Kamil suffering from such a condition and having the financial wherewithal to hire a lawyer (which was never put in doubt), there was all the more need to have Save On represented by a lawyer firmly in charge.

- The trial, therefore, suffered from Mr. Kamil's direction over Save On's case: the lack of attention to fair procedure; the penchant for argument over evidence; the lack of attention to detail and corroboration; the wandering into collateral and marginal issues; the accusations of misconduct by lawyers (both lawyers for Save On and the defendants) without proof; the use of expert evidence that was tainted by Save On's influence; and the unproven accusations of fraudulent misrepresentations by Mr. Bashir. I described many of these issues in my Reasons.

- For the period prior to the representation motion on April 11, 2022, there was evidence of Save On undercutting its lawyers causing delay. For instance, there was the motion Save On insisted on in September, 2021 (contrary to its lawyer's advice) for an order striking the defendants' pleadings due to a deficient Scott Schedule. This was unnecessary since Mr. Kennaley had just been retained and had undertaken to correct the problem. There were also the many times Mr. Kamil wrote or corresponded directly with defendants' counsel. There was also the repeated turnover of lawyers for Save On. In the end, I counted a total of four turnovers of legal representation for Save On. I note that Mr. Kamil admitted during this reference that he effectively represented Save On throughout. Discontinuity in legal representation added to the lack of focus and direction to Save On's case. Furthermore, and most importantly, it undermined the "gatekeeper" function Save On's lawyer was supposed to serve in this lien proceeding; see *Brian T. Fletcher Construction Co. v. 1707583 Ontario Inc.,* 2009 CarswellOnt 8879 at paragraphs 35-37.

- In his submissions Mr. Kennaley pointed to numerous statements of fact in the defendants' request to admit that Save On should have admitted and did not, thereby lengthening the proceeding. I agree.

- The pleading amendment I allowed Save On to make on September 13, 2021, namely the amendment whereby Save On alleged that Mr. Bashir was really a "builder" and misrepresented his position to Save On, proved in the end at trial, after a review of the governing contracts and legal authority, to be without foundation. The evidence clearly

2023 ONSC 7284 (CanLII)

showed that Save On always was the "builder." The Save On amendment introduced further complexity, particularly as it seemed to take the case in a new direction and raise the new remedy of rescission. This complexity was exacerbated by Save On's poor pleadings and by Save On's sloppy trial submissions which referred to Cityscape (the contracting party in the Project Management Agreement) and Mr. Bashir interchangeably.

2023 ONSC 7284 (CanLII)

[25] In its written submission, Save On simply denies that there was evidence that it knew its claim for lien was without foundation. I disagree for the reasons stated above. Save On submitted that it was Ms. Sheikh's admitted delays at the outset of the reference that caused delays. That is a valid point and will be taken into consideration. But these delays were minor compared with the issues raised by Save On's conduct as described above. Save On argued that it was the defendants who caused an excessive number of trial management conferences and interlocutory steps. Other that the issues with Ms. Sheikh and the defendants' affidavit of documents and Scott Schedule work, which will be discussed later, I do not agree. I note that it was Save On who kept introducing new issues, such as the pleading amendment concerning the "builder" issue, that delayed the reference.

[26] I also note with concern that Save On raised points in these submissions that it had not previously raised. It argued that there was no distinction between project security and builder security, and that the parties knew this when the contract was negotiated. This is not the position Save On took at trial. It also offered no evidence to support this statement. Save On also stated that Tarion paid the defendants interest on the $80,000 of posted project security. It gave no evidence to support this statement. Save On also argued that Mr. Bashir promised other projects to Save On, and that this is what caused the contract price to be too low. This position was not presented at trial and there was no evidence to support it. These are yet further examples of Save On's profound lack of respect for the evidentiary record and due process.

[27] Therefore, for the above noted reasons, I have decided that Save On should pay substantial indemnity costs for the entirety of this action.

Mr. Kamil's personal liability

[28] The defendants want my award of costs as against Save On to apply to Mr. Kamil personally as well. There can be personal liability for costs of a representative of a lien claimant under *CA* section 86(1)(b) where that person knowingly represents a party at trial where it is clear that the claim for lien is without foundation. That would pertain to the period in this case after Save On received leave to be represented by Mr. Kamil on April 12, 2022.

[29] There can also be personal liability for costs imposed on the principal of a corporate lien claimant by "piercing the corporate veil." That can be done where that principal completely dominates and controls the corporation and uses the corporation to shield fraudulent or improper conduct. This principle was elucidated by the Court of Appeal in *642947 Ontario Ltd. v. Fleischer*, 2001 CarswellOnt 4296 at paragraph 68, as referred to by Master Albert in *Canadian Affordable Roofing Ltd. v. Law* 2008 CarswellOnt 9437 at paragraph 25. The application of this principle depends on the circumstances of each case. In *Fleischer* the court pierced the corporate veil because the principals behind the corporate tendered an undertaking that they knew was worthless. In *Canadian Affordable Roofing*, Master Albert pierced the corporate veil to impose costs on the principal of the corporate lien claimant because he represented the lien claimant after it was dissolved and did so in registering

a claim for lien and pursuing the lien action. If applied to this case, this principle would apply to the entirety of this proceeding.

[30] I have no difficulty imposing personal liability for costs on Mr. Kamil in this case. Mr. Kamil abused Save On to recover financial losses. The company was under financial stress by the end of 2017. It took Save On nine months and considerable legal expense to get Tarion registration. Mr. Kamil stated in correspondence and in cross-examination that the company needed and wanted help in paying the unanticipated legal costs of the registration. Most importantly though, Mr. Kamil stated openly in several emails in late 2017 that Save On had underbid this project and badly needed cash flow to finish. Mr. Bashir even considered contributing to Save On's legal costs to help. That it was Mr. Kamil who dominated Save On and made all the decisions for the company is without question. There was no evidence that the company had other employees, much less employees who influenced Mr. Kamil. As noted earlier, Mr. Kamil even went so far as to undercut Save On's own lawyers in this case.

2023 ONSC 7284 (CanLII)

[31] I find that it was Mr. Kamil who solely caused Save On to engage in extortionary activity leading up to and including January, 2018. He did so by causing the company to render the improper invoice for the extra based on the revised contract price to make up for the company losses, by causing the company to stop work when that invoice was not paid leaving the defendants with an unfinished project, and then by causing the company to register the claim for lien. In my reasons, I found this conduct to be a repudiation of the contract. For the purposes of this decision, I also find it to be improper, abusive and outrageous conduct. To allow Mr. Kamil to use the "corporate veil" to escape costs liability for having caused Save On to engage in improper conduct such as this, and to leave the defendants with recourse only to Save On, whose means are unclear, for the recovery of costs would be unjust. I also find that Mr. Kamil knowingly represented Save On at trial where it was clear that the Save On claim for lien was without foundation.

[32] In its written submission, Save On simply denies that the corporate veil should be pierced in this case without addressing the core issue of Mr. Kamil's dominance over Save On and his misuse of the company for extortionary purposes, as described above.

[33] Therefore, I have decided to impose personal liability for costs on Mr. Kamil for the entirety of this action.

Quantum

[34] The defendants claim $276,199.86 in substantial indemnity costs as against Save On and Mr. Kamil. This is less than 90% of the actual legal costs incurred by the defendants as shown in the costs outline filed by the defendants, namely $314,199.11.

[35] What governs this issue is the limitation imposed by *CA* section 86(2) where it is stated that the costs awarded a party in a lien action "shall not" exceed the costs that party would have incurred by taking the least expensive course of action. In my view, this section incorporates the doctrine of proportionality contained in Rule 1.04(1.1) which specifies that the court must make orders that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding.

[36] I note that the defendants' cost outline includes $42,375 for the substantial indemnity costs that were incurred by the defendants on account of their first lawyer, Salma Sheikh. $21,187.50 of this amount concerned the stated amount of 50 hours Ms. Sheikh spent on the defendants' affidavit of documents and Scott Schedule. As I stated in my reasons of October 9, 2020, I found that Ms. Sheikh was inexperienced in construction cases who should have gotten experienced construction counsel involved much sooner. She had particular difficulty with the Scott Schedule and the productions. I note that defendants' costs outline includes much time spent by the Kennaley firm on reviewing the defendants' affidavit of documents and productions and reviewing and revising the defendants' Scott Schedule. I am, therefore, not prepared to award costs for this $21,187.50 as I find that it was either duplicated later by the Kennaley firm or of minimal value in the advancement of this proceeding.

2023 ONSC 7284 (CanLII)

[37] The defendants' costs outline excludes the events about which I previously ordered costs, such as the Save On motion to strike in September, 2020. It includes the costs the defendants incurred on account of Save On's representation motion that I heard on April 11, 2022 and determined on April 12, 2022. In short, it contains the costs that should be considered.

[38] Prominent features of the defendants' costs outline are the times shown for lead and associate counsel. Incidentally, it became apparent to me in studying the document that the total hours shown for Mr. Kennaley was mistakenly overstated by 58.5 hours. After making this adjustment, the total time shown for Mr. Kennaley was 233 hours, with most of that time at a substantial indemnity rate of $540. There is also considerable time shown for Mr. Kennaley's associate, Josh Winter, namely 189 hours and at substantial indemnity rates of between $301.50 per hour and $337.50 per hour. I calculate the total cost claimed for Mr. Kennaley's work at $141,425, which is 63% of the total claimed for costs on account of the Kennaley firm and 51% of the total claim. The total cost claimed for Mr. Winter's work is $67,934 which is 30% of the total claimed for the Kennaley firm and 24% of the total claim. The question is whether this cost is proportionate and reasonable.

[39] I agree with Mr. Kennaley that the issues in this action were not of general importance. However, the complexity of this case is a significant consideration. Most of Mr. Kennaley's time was spent on preparing the evidence for trial, preparing for and attending at trial and preparing for and attending at the Save On motions to amend its pleadings and for leave to be represented by Mr. Kamil. Mr. Winter's time concerned production and discovery. The core of this case was not complex. It turned largely on contract interpretation. Mr. Kamil made the case much more complex than it had to be on account of his conduct. Here are examples: he insisted on interpretations of the governing contracts that were not reasonable; he constantly made allegations of fraudulent conduct against Mr. Bashir; he raised new issues at trial such as the issue of whether the defendants were "vendors" under the *ONHWPA;* he wandered constantly into collateral issues such as the conduct of Mr. Winter at discoveries; he denied numerous facts in the request to admit that should have been admitted. This warranted the use of experienced counsel, such as Mr. Kennaley's firm, by the defendants.

[40] The issue of whether the amounts at issue justified this expenditure in costs is of minimal concern. The total amount at stake in the claim and counterclaim was close to $820,000, namely the claim for lien of about $225,000 and the counterclaim of just over $596,000. Therefore, the expenditure of costs in the $300,000 range is not overly disproportionate. After all, the defendants had to prepare several witnesses and affidavits, all of which were necessary for the determination of

the result. In any event, the doctrine of proportionality should not be used to deny a party recovery for costs that could not be avoided and that are not unreasonable in all the circumstances; see *London Eco-Roof Manufacturing Inc. v. Syson,* 2020 CarswellOnt 6931 at paragraph 41.

[41] In its written submissions, Save On referred me to a few cases concerning proportionality. In these cases, Save On argued, the courts ordered fewer costs than claimed by the defendants with cases of a similar volume of work, or reduced a claim for costs significantly where it was found there were excessive hours claimed. There was *Kalogon, op. cit.,* at paragraph 45 where the court awarded the successful party $190,000 all-inclusive in costs for a case that went through a 17 day trial and the successful party claimed costs in the range of twice that amount. A major factor in this award was what the court found to be the excessive hours claimed. In *Paulin v. P.C.M. Collections Ltd. (c.o.b. Professional Collection Management)* [2008] O.J. No. 125, Justice Smith awarded the successful plaintiff only $20,000 for a 3 day trial where the plaintiff had claimed almost three times as much in substantial indemnity costs and twice as much in partial indemnity costs. The judge found there was excessive work for a case that was relatively simple. In *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* [2002] O.J. 921 Justice Nordheimer found the expenditure of 100 hours on a half day motion excessive, and made an award of costs based on 30 hours.

[42] Largely I find these decisions distinguishable. None of them dealt with a self-represented party with the history of conduct that was shown in the case before me. This is what created the complexity that justified the costs incurred by the defendants. Nevertheless, I will bear this authority in mind in making my ruling.

[43] I have already canvassed several other Rule 57.01(1) factors in my discussion about the standard of costs to be awarded, namely the result, the offers to settle, the complexity of the proceeding, the conduct that tended to shorten or lengthen unnecessarily the proceeding, and the refusal to admit facts. I reiterate those comments here to support my conclusion that the quantum of the costs award should be high.

[44] There is one Rule 57.01(1) factor that bears special attention. It is the reasonable expectation as to costs of the unsuccessful party. A useful gauge of the reasonable expectation of the unsuccessful party's as to costs is its own costs outline. As stated earlier, Save On's costs outline shows a total of only $95,088.55. This amount is stated as "not including Mr. Kamil's time." The total amount of lawyer time shown is 200.83 hours. Interestingly, the costs outline includes the additional amount of 120 hours for Mr. Kamil, but does not include that figure in the overall calculation. It is stated that the court should determine the amount of work to be claimed for Mr. Kamil.

[45] Adding the suggested amount shown for Mr. Kamil to the lawyer time produces a total of 320.83 hours of work shown in the Save On costs outline. That is a fraction (60%) of the 532.25 hours shown on the defendants' costs outline for Mr. Kennaley's firm and Ms. Sheikh's firm (excluding Ms. Shiekh's time for preparing the affidavit of documents and Scott Schedule).

[46] I also note that the hourly rates for the lawyers Save On hired are shown to be significantly lower than the rates in the defendants' costs outline for Messrs. Kennaley and Winter. The rates shown in Save On's costs outline for Save On's lawyers ranged from $350 to $450 per hour on a "full indemnity" scale. The full indemnity rates for Mr.. Kennaley is between $475 per hour and

2023 ONSC 7284 (CanLII)

$600 per hour; the full indemnity rate for Mr. Winter is shown to be between $335 and $375 per hour. I described the substantial indemnity rates for Messrs. Kennaley and Winter earlier.

[47] After careful consideration, I have decided to make a reduction in the defendant's costs award on account of this factor. On the one hand, the Save On cost outline is not a fair gauge of what Save On and Mr. Kamil should reasonably expect to pay in costs in the event of a loss. As stated earlier, Mr. Kamil ran this case for Save On, and the work shown in the Save On costs outline for Mr. Kamil is, in my view, understated. Also, the higher legal costs for the defendants correlated with the higher quality of their case. The defendants had more affidavits, more and better expert evidence, more affidavits that focused on detail and the facts, and more compelling legal briefs. The higher rates for the defendants' lawyers were largely justified. Experienced counsel was necessary to deal effectively with all the issues Mr. Kamil raised.

[48] On the other hand, I note the significant disparity between the two costs outlines of the parties as to quantum of the hours of work shown. This creates a concern that excessive work was done for the defendants. I also note the delays that were caused by Ms. Sheikh when she represented the defendants. In the end, I find that Save On and Mr. Kamil had some reason to expect not to have to pay costs in the amount claimed.

[49] Concerning the representation motion I heard on April 11, 2022 and determined on April 12, 2022, I find that, despite the fact that Save On succeeded on that motion and paid the ordered $56,000 into court, Save On was not forthright with the court. It failed to disclose Mr. Kamil's ADHD condition,. That information would have been vital to the motion and may have changed the result. As a result, I find that Save On should, despite its success, not get costs of that motion and that there should be order of no costs for this motion. This result was taken into consideration in my costs award.

[50] In the circumstances, for all the above reasons, I find that a reasonable award of costs is an award in favour of the defendants of substantial indemnity costs in the amount of **$225,000**, to be paid to the defendants by Save On and Mr. Kamil jointly and severally.

[51] The $56,000 of security posted by Save On pursuant to my order of April 12, 2022, plus accrued interest thereon, must be paid to the defendants on account of this award. This will obviously reduce the net amount Save On and Mr. Kamil must pay.

INTEREST

[52] The defendants claim prejudgment interest on the judgment amount, namely the $517,454.66. In their pleading, the defendants claim prejudgment interest in accordance with the *Courts of Justice Act,* R.S.O. 1990, c. C.43 ("*CA*"), section 128 and post-judgment interest in accordance with *CA,* section 129.

[53] Concerning prejudgment interest, *CA* section 127(1) specifies that the rate should be the rate that applies when the proceeding, namely the counterclaim, commenced. That would be the fourth quarter of 2018 and the rate would be only 1.5%. Section 128(1) specifies that the interest should run from the date the cause of action arose. In their written submissions, the defendants concede for the sake of convenience that the interest should be calculated on the entire judgment amount from

2023 ONSC 7284 (CanLII)

October 7, 2019, the date they made their last payment to complete the project. This was not disputed.

[54] There is an issue concerning the rate. The defendants argued in their written submissions that the 1.5% rate was too low as the rates since October 7, 2019 have varied considerably, dropping during the pandemic to 0.5% and then in 2023 ranging from 4% in the first quarter to 5.3% in the final quarter. They argued that there should be a blended rate of 1.6% which was the result of tallying the rates specified for the final quarter of 2019 and all quarters thereafter to and including the second quarter of 2023 when the written submissions were made, and dividing the result by the number of quarters. This position was not challenged, and I accept it. It recognizes the true losses suffered by the defendants from having paid the damages leading to the judgment amount.

[55] I note, however, that the prejudgment rates have remained high in the final two quarters of 2023, namely 4.8% and 5.3%. This pushes the blended rate calculation close to 2%. The prospect is that these rates will remain this high for the foreseeable future. I have, therefore, decided to order that the prejudgment interest should be **2% per annum** calculated from **October 7, 2019.**

[56] This produces a yearly interest amount of $517,454.66 x 0.02 = $10,349.09, and a *per diem* interest amount of $10,349.09/365 = $28.35. There are 1,369 days between October 7, 2019 and the date of this ruling, December 29, 2023. Therefore, as of today, $38,811.15 of prejudgment interest has accumulated. The final prejudgment interest amount will be determined as of the date my report is confirmed.

[57] The defendants also claim prejudgment interest on the defendants' $80,000 of project security. This amount plus any accrued interest thereon in court must be paid out of court to the defendants pursuant to my reasons. The defendants argue that prejudgment interest on this amount should run from March 18, 2021 when Tarion informed the parties that these monies could be paid into court. Mr. Kamil insisted that these monies be paid into court to secure the Save On claim, and they were eventually paid into court by way of a consent order. There was no dispute about the defendants' position, and I accept it.

[58] As for the applicable rate, the prejudgment rates varied significantly between the first quarter of 2021 (0.5%) and the last quarter of 2023 (5.8%). As a result, I have decided to use the same **2% per annum** calculated from **March 18, 2021.** At 2% per annum, the yearly interest is $1,600, and the *per diem* amount is $4.38. There are 1,016 days between March 18, 2021 to the date of this ruling. Therefore, as of today, $4,450.08 of prejudgment interest has accumulated on the posted project security and must be paid (less any amounts paid on account of same) to the defendants. Again, the final prejudgment interest amount will be determined as of the date my report is confirmed.

[59] The post-judgment interest on these amounts (ie. the judgment amount, the costs award and the prejudgment interest on same) will also be determined as of the date my report is confirmed.

Released: December 29, 2023

____

ASSOCIATE JUSTICE C. WIEBE

2023 ONSC 7284 (CanLII)

CITATION: 1917196 Ontario Ltd. v. Kazmi, 2023 ONSC7284
COURT FILE NO.: CV-18-594953

2023 ONSC 7284 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of the *Construction Act, R.S.O. 1990, c. C.30*

B E T W E E N:

1917196 Ontario Ltd. o/a Save On Contracting
.

Plaintiff

- and -

Sadaf Kazmi, Shazia Tareen, Tasneem Zahir and Adnan Bashir

Defendants

COSTS AND INTEREST DECISION

Associate Justice C. Wiebe

Released: December 29, 2023