

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
2449442 Ontario Inc.)	Chantal Beaupré and Nathan Clarke, for the
)	Plaintiff/Defendant to the Counterclaim
Plaintiff/)	
)	
Defendant to the Counterclaim)	
)	
– and –)	Benjamin E. Jefferies, for the Defendant/
)	Plaintiff by Counterclaim
Cambridge Drywall Services LTD.)	
)	
Defendant/ Plaintiff by Counterclaim)	
)	
)	
)	
)	HEARD: In writing

DECISION REGARDING COSTS

R. SMITH J.

Overview

[1] The Plaintiff (“244”) was successful in recovering \$82,752 from the Defendant (“CDS”) at trial in a construction lien case. However, CDS was successful on its counterclaim and recovered \$30,000. The net result is the amount of \$52,752 payable to the 244. CDS was successful in defending on issue #3 for \$411,978 and a substantial part of issue #2, plus some smaller amounts, for a total success of \$569,693 of the \$652,445 claimed by 244. The Defendant was more successful than the Plaintiff based on the amounts claimed.

[2] CDS also made a written offer to settle for \$80,000 plus \$40,000 for costs. This amount exceeds the net amount of \$52,752 recovered by the Plaintiff after the amount of the counterclaim

recovery is deducted. However, the offer to settle was made 8 calendar days, but 5 judicial days, before the commencement of trial and as a result does not attract the cost consequences of a valid Rule 49.10 (2) offer. In addition, the amount offered for costs was less than the partial indemnity costs incurred by the Plaintiff to the date of the offer to settle.

Positions of Parties

[3] Both parties seek to recover their costs on a partial indemnity basis, \$219,799 for the Plaintiff and \$146,050 for Cambridge from the date of its offer to settle, as both claim that they were successful at trial. The Defendant submits that the court should consider its reasonable offer to settle under Rule 49.13 to award it costs. The Plaintiff argues that the Defendant's offer to settle was not valid as it was delivered 5 days before trial which is less than the 7 days required by Rule 49. The Plaintiff also submits that the amount offered for costs was inadequate at this late stage of the proceeding.

Factors

[4] The factors to be considered when fixing costs are set out in Rule 57 of the *Rules of Civil Procedure* and include in addition to success, the amount claimed and recovered, the complexity and importance of the matter, scale of costs and any offer to settle including Rule 49.13, the principle of indemnity, hourly rate claimed the time spent and the amount that a losing party would reasonably expect to pay.

Success

[5] In this case, 244 was completely successful on issue #5 for \$30,601 and issue #1 for \$8750 and partially successful on issue #4 for \$18,445. CDS was largely successful on issue #2 and issue #3 where 244 claimed \$45,525 and recovered \$3,927 and on issue #3 where 244 claimed \$411,978 and recovered \$21,029. Success was divided on the issues but CDS was more successful in defeating a much larger percent of the amount claimed by 244.

Amount Claimed and Recovered

[6] As mentioned above, CDS was successful in defending against claims in the amount \$569,693 of the total amount claimed of \$652,445. This amounts to success on 87% of the amount

claimed plus a counterclaim of \$30,000 which brings it to success to 91.9% of the amount claimed. Stated another way, 244 was successful on \$82,752 of the amount claimed of \$652,445, or on approximately one seventh of the amount claimed. CDS dropped its counterclaims of \$660,000 except its claim for damages for an excessive claim for lien, by answer to undertaking dated May 18, 2022 and not on August 29, 2023 as alleged by the Plaintiff. CDS recovered \$30,000 of its counterclaim for \$44,825 which is 62% of the amount claimed. However, the Plaintiff was required to commence an action to recover the amount owing as CDS did not make any offer to settle until the eve of trial.

Complexity and Importance

[7] The issues were quite complex as they involved a large volume of relevant documents and the issues were important to the parties.

Scale of Costs and Offers to Settle

[8] CDS claims costs of \$146,050 on a partial indemnity scale from the date of its offer to settle on October 2, 2023 because it was almost identical to the amount recovered by the Plaintiff in its action, \$80,000 compared to \$82,752 recovered after trial. In addition, CDS recovered \$30,000 on its counterclaim which left the Plaintiff with a net recovery of \$52,752. The offer of \$80,000 exceeded the net amount recovered by 244 by a substantial amount.

[9] CDS offered to pay costs of \$40,000 on October 2, 2023 and the trial started on October 10, 2023. CDS did not make any other offers to settle in the 5 years before the trial commenced. The offer was made on the eve of trial and the Plaintiff submits that it had incurred costs on a partial indemnity basis in excess of \$108,983 to October 2, 2023. In *Rooney (Litigation Guardian) v. Graham (2001)*, 2001 CanLII 24064 (ONCA), the Court of Appeal stated that Rule 49 “is a simple recognition that if an offer is accepted it should carry with it party and party costs”.

[10] The Defendant’s offer to settle is a factor to consider when fixing costs as the Court of Appeal has held in several cases. The offer was made 8 days before the commencement of trial but because of Thanksgiving weekend there were only 5 juridical days before trial. As a result, the offer to settle does not meet the requirements of Rule 49.10(2). The amount offered was almost

identical with the amount awarded plus CDS was successful on its counterclaim to the extent of \$30,000. However, the amount offered for costs of \$40,000 was substantially less than the \$108,983 incurred by the Plaintiff to the date of the offer. The offer was a near miss with regards to amount of the claim and with regards to timing and as a result is a factor to be considered in taking a holistic approach that reduces the amount of the Plaintiff's costs but does not entitle CDS to receive costs.

[11] CDS submits that costs penalties should be imposed on the Plaintiff because it did not proceed under the simplified procedure under subrule 76.01(6). However, subrule 76.13(2) does not apply to an action commenced under the *Construction Act*, R.S.O. 1990, c. C.30. Subrule 76.01(b) provides that "simplified procedure set out under this Rule" does not apply to "actions under the *Construction Act*, except for trust claims" The action was brought under the *Construction Act* and the Plaintiff did not advance any trust claims and so subrule 76.13(2) does not apply in this case. As a result, there will not be any reduction of the Plaintiff's costs for not following the simplified procedure set out in Rule 76. The *Construction Act* provides for a similar simplified procedure in any event.

Hourly Rates, Time Spent, and Indemnity

[12] The parties do not object to the hourly rates charged by each other and I find that the rates were reasonable in the circumstances of this case. I also find that neither party acted unreasonably during the trial.

Amount the Unsuccessful Party Would Reasonably Expect to Pay

[13] The Defendants costs to October 2, 2023 are less than those of the Plaintiff which is to be expected but they are in the same range.

[14] To assess the reasonable expectations of the parties I must consider the net recovery of \$52,752 by 244 after a 5-week trial, where CDS offered to settle for \$80,000 plus \$40,000 for costs 5 days before the commencement of trial. CDS also acknowledged at trial that it owed certain amounts to 244, (\$3,927 for piecework and \$15,793 for time and materials) for which it had not paid. 244 was required to commence an action in order to obtain payment. I find that CDS would

expect a reduction in 244's costs due to the small recovery when compared to the amount claimed, but would also expect to pay some costs because its offer to settle did not meet the requirements of Rule 49.10 and the Plaintiff did recover a net amount of \$52,752 after trial.

Disposition

[15] Having considered all the above factors, including CDS's offer to settle and the divided success, although CDS was more successful in its defence, but 244 recovered a net amount of \$52,752, CDS is ordered to pay costs to 244 fixed in the amount of \$100,000 plus HST and disbursements of \$16,612.55 plus applicable HST.

The Honourable Justice Robert Smith

Released: June 26, 2024

CITATION: 2449442 Ontario Inc. v. Cambridge Drywall Services LTD., 2024 ONSC 3673
COURT FILE NO.: CV-18-78819
DATE: 2024//06/26

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SUPERIOR COURT OF JUSTICE

BETWEEN:

2449442 Ontario Inc.

Plaintiff/Defendant to the Counterclaim

– and –

Cambridge Drywall Services Ltd.

Defendant/Plaintiff by Counterclaim

DECISION REGARDING COSTS

R. Smith J.

Released: June 26, 2024