

CITATION: 2174372 ONTARIO LTD. V. LENA AKBARI and ROBINA OMARI
2024 ONSC 4053
COURT FILE NO.: CV-18-3604
DATE: July 18, 2024

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2174372 ONTARIO LTD)
)
Plaintiff)
) Wei Jiang
– and –)
) Lawyer for the Plaintiff
LENA AKBARI AND ROBINA OMARI)
) Emraan Dharsi and Riaz Ahmed
Defendants)
) Lawyers for the Defendant
)
)
)

HEARD: February 13, 2024

WOODLEY, J

COSTS ENDORSEMENT

OVERVIEW

1. On January 9, 2023, a *Mareva* injunction was granted on an *ex parte* basis by Justice Verner, which injunction was extended by a further *ex parte* order granted by Justice Bale on February 2, 2024.
2. The Order of Justice Verner, which was extended by Justice Bale, both on an *ex parte* basis, was a sweeping injunction that froze the entirety of the defendant Akbari's assets, worth over \$1.3 million.
3. On February 13, 2024, the return of the *Mareva* injunction came before me for hearing in open court in the presence of counsel for the plaintiff and the defendants. Both parties filed extensive materials and counsel attended to argue the injunction.

4. Having read the application record and responding records filed, and after hearing submissions for the plaintiff and the defendants, on February 13, 2024, for oral and written reasons for decision delivered, I denied the injunction as the plaintiff had failed to establish a strong *prima facie* case and failed to make full and frank disclosure which was fatal to the motion. As a result, the motion was dismissed, subject only to the determination of costs.
5. The court has now had an opportunity to review the written costs submissions. This endorsement is my determination of the issue of costs.

FACTS

6. The within lawsuit arises in the context of a failed agreement of purchase and sale (“APS”) between the parties, which was the subject of a motion for summary judgment before Justice Charney on October 25, 2023.
7. Pursuant to Justice Charney’s Reasons for Decision relating to the summary judgment heard October 25, 2023, while there is no question that there was a breach of the APS, insufficient evidence was filed to allow any determination on the issue of damages, including whether *any* damages flow from the breach of the APS.
8. In Justice Charney’s words, the material filed left “too many unanswered questions” about the subsequent sale of the property, mitigation, and the proper calculation of damages to succeed.
9. None of the gaps in the evidence as noted by Justice Charney were filled prior to the hearing of the *Mareva* injunction. As the cornerstone of a *Mareva* injunction requires full and frank disclosure by the party seeking injunctive relief, the motion failed, subject only to determination of the costs of the motion.

THE LAW AND ANALYSIS

Entitlement to Costs

1. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that subject to the provisions of an Act or the rules of court, the costs of and incidental to a proceeding or step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.
2. The general principle is that a successful party is entitled to costs. It is accepted that this general principle should not be departed from unless there is good cause to do so.
3. The general principles that apply in fixing costs are set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194.

4. Pursuant to Rule 57, in exercising discretion under s. 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing:
 - i. the principle of indemnity, including where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged, and the hours spent by that lawyer;
 - ii. the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - iii. the amount claimed and the amount recovered in the proceeding;
 - iv. the apportionment of liability;
 - v. the importance of the issues;
 - vi. the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding;
 - vii. whether any step in the proceeding was,
 1. improper, vexatious or unnecessary, or
 2. taken through negligence, mistake or excessive caution;
 - viii. a party's denial or refusal to admit anything that should have been admitted;
 - ix. whether it is appropriate to award any costs or more than one set of costs; and
 - x. any other matter relevant to the question of costs.
5. The fixing of costs is not a mechanical or mathematical exercise and should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant. See: *Davies v. Clarington*, 2009 ONCA 722; and *Zesta Engineering v. Cloutier*, CanLii 25277.
6. The overriding consideration is that the amount fixed for costs should be fair and reasonable in all the circumstances and is an amount that the losing party could reasonably have expected to pay is unsuccessful. See: *Boucher v. Public Accountants*, 2004 CanLII 14579 (ONCA).
7. I am required to fix costs in all but exceptional cases. This is not an exceptional case, and I will fix the costs.

Type of Costs Sought

8. Counsel for the defendants seeks costs on a complete indemnity basis due to the moving party's failure to provide full land frank disclosure. In seeking full indemnity costs, counsel refers the court to several decisions of the court where full indemnity costs were awarded for this very same reason. See *Sweda Farms Ltd. V. Ontario Egg Producers*, 2011 ONSC 2428; and *Royal Bank of Canada v. Azkia*, 2019 ONSC 5894.
9. Counsel for the plaintiff submits that although the injunction was unsuccessful, the "admitted fraudulent conveyance created a substantial risk of dissipation of assets that merited attempts to take action on the plaintiff's part. The motion was not brought in a frivolous nor vexatious manner". The plaintiff submits that no costs out to be awarded.
10. I am of the view that this case calls for a balancing of the positions of the parties such that costs shall be awarded to the defendants as the successful party, but such costs should be awarded on a partial indemnity basis to balance the varying concerns with respect to both parties' conduct. In the circumstances, costs shall be awarded to the defendants on a partial indemnity rate.

Amount of Costs Sought

11. Counsel for the defendants provided a Bill of Costs/Costs Outline and set out the various awards sought separated by partial indemnity/substantial indemnity/full indemnity basis.
12. I have had an opportunity to review the Bill of Costs and am content that the fees sought when awarded on a partial indemnity basis and adjusted to account for duplication and matters not related to the motion, are reasonable and are costs that could reasonably have been anticipated to have been sought.

CONCLUSION

13. In considering the costs award payable, I have determined an amount that in my view reflects a fair and reasonable assessment of the amount that should be paid to the successful party rather than an exact measure of the actual costs of the successful litigant. I have specifically considered the expectations of the parties, including the defendant, as a relevant factor.
14. Having considered all applicable principles, including the principle of proportionality and fairness, the defendants' bill of costs, and disbursements, I hereby determine that the following represents a fair and reasonable amount chargeable to the plaintiffs in the circumstances of this case, I hereby fix the defendants' fees and disbursements at \$12,500.00 PLUS HST PLUS DISBURSEMENTS of \$228.06 which amount shall be payable by the plaintiff to the defendants within 30 days of the date herein.



Justice S.J. Woodley

Released: July 19, 2024

Released:

The Honourable Madam Justice S. J. Woodley

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SUPERIOR COURT OF JUSTICE

BETWEEN:

2174372 ONTARIO LTD.

Plaintiff

– and –

LENA AKBARI AND ROBINA OMARI

Defendants

COSTS ENDORSEMENT

The Honourable Madam Justice S.W. Woodley

Released: