

**CITATION:** Strength-N-U Inc. v. Daniel Silva, 2024 ONSC 5372  
**COURT FILE NO.:** CV-23-711209-0000  
**DATE:** 20240927

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
STRENGTH-N-U INC.	)	Daren Frank, for the Plaintiff
	)	
	)	Plaintiff
	)	
<b>– and –</b>	)	
	)	
DANIEL SILVA, JERIKKA NAHIBUAN	)	Allan Weiss, for the Defendants
and PERFORMANCE RECOVERY	)	
THERAPY INC.	)	
	)	
	)	Defendants
	)	
	)	
	)	
	)	<b>HEARD:</b> In Writing

2024 ONSC 5372 (CanLII)

**PAPAGEORGIU J.**

**COSTS ENDORSEMENT**

**Overview**

[1] I dismissed a motion for an injunction brought by the former employer of the defendants on the basis that they were operating a competing business in breach of their fiduciary obligations.

[2] The defendants seek fees of \$38,520 on a substantial indemnity basis or \$25,680 on a partial indemnity basis or plus \$3,234 in disbursements and HST.

**Decision**

[3] For the reasons that follow, I award the defendants their full partial indemnity costs as claimed.

**Analysis**

[4] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161

(Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

[5] The defendants made an offer to settle on June 10, 2024, on the basis that they would agree to a dismissal without costs. The plaintiff rejected this offer. The defendants ask that I exercise my discretion to award substantial indemnity costs throughout as a result citing *Dunstan v. Flying J. Travel Plaza*, 2007 CanLII 44819.

[6] I reject this argument for the following reasons:

- The motion was argued on July 11, 2024. Most of the work had already been done as of that time including all the records and cross examinations. Any additional work would have been preparing for argument. Even if r. 49.10 applied, which it does not, a successful defendant would not obtain substantial indemnity costs throughout but only for after the time it makes an offer.
- The defendants have not provided any separation of the time they spent that would permit the court to calculate what the substantial indemnity costs would be for the time period after they made their offer.
- The court has the discretion to award substantial indemnity costs, but such costs are “rare and exceptional” and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.
- I found that the plaintiff had established a substantial issue to be tried as to whether the defendants breached a duty of confidence by using exported confidential information from the Software to contact and solicit former clients.

[7] In terms of the quantum, I agree that the amount was relatively complex both factually and legally with 6 affidavits and 5 witnesses produced for cross-examination over two days. Many documents were produced as well. The issues were highly important to the defendants as the plaintiff was seeking orders that would effectively shut down their business. The rates charged are reasonable with Mr. Weis (a 6 year call) having a billable rate of \$350 per hour and Mr. Vaturi (a 12 year call) having a billable rate of \$450.

[8] The partial indemnity costs claimed by the defendants are comparable to those set out in the plaintiff’s bill of costs; therefore, these costs would be in the plaintiff’s reasonable contemplation.

**Conclusion**

[9] Therefore, I award \$25,680 on a partial indemnity basis or plus \$3,234 in disbursements and HST for a total of \$32,672 payable within 14 days.

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Papageorgiou J.

Released: September 27, 2024







