

CITATION: Amelin Engineering v. Steam-Eng Inc., 2024 ONSC 3613
COURT FILE NO.: CV-09-375888
DATE: 20240624

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AMELIN ENGINEERING LTD. and MICHAEL ELINSON

AND:

STEAM-ENG INC. and BLOWER ENGINEERING INC.

BEFORE: Madam Justice A.P. Ramsay

Michael Elinson, in person

Jonathan F. Lancaster and Rachel Laurion, for the Defendants

HEARD: June 21, 2024

ENDORSEMENT RE: APPOINTMENT TO SETTLE JUDGMENT

[1] Counsel for the defendants as well as Mr. Elinson attended before me, by phone, for a Chambers appointment, to settle the terms of my endorsement on Costs rendered on September 6, 2022. No lawyer attended on behalf of the corporate plaintiff. Mr. Elinson's sole objection is that he is also personally liable for costs. I advised all that I am prepared to sign an order that reflected my disposition on costs and not the proposed draft order, which reflected a compromise between the parties.

[2] Following the attendance, Mr. Elinson sent an email to my judicial assistant on the same day at 1:25 p.m. in the afternoon. The email was not copied to defence counsel. The email reads:

-----Original Message-----

From: michael elinson <elin26@gmail.com>

Sent: Friday, June 21, 2024 1:25 PM

To: Diamante, Polly (JUD) <Polly.Diamante@ontario.ca>

Subject: Conference call

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Dear Polly,

Please forward my question to Her Honor, which I forgot to ask her during the conference call today.

Thanks,
Michael Elinson.

Your Honor,

Thank you for the opportunity to speak
with you today.

Please advise if it would possible to delay entering the Costs Award Order until the motion to remove me as plaintiff , as per R. 5.04.2, is completed and the result is known.

Respectfully,
Michael Elinson.

[3] My response to Mr. Elinson’s email is contained in this brief endorsement.

[4] The trial in this matter took place well over three and a half years ago, with Reasons for Judgment dated September 8, 2021, reported at 2021 ONSC 5799 (“the trial judgment”). My decision on costs was rendered on September 6, 2022, and is reported at 2022 ONSC 5064 (the “Costs Endorsement”).

[5] The plaintiffs delivered a Notice of Motion for Leave to Appeal costs dated September 21, 2022 (“Notice of Motion”), pursuant to s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The plaintiffs had appealed the trial judgment in the interim. The plaintiffs did not join the appeal of costs with the appeal of the trial judgment. On November 17, 2022, the Court of Appeal released its decision dismissing the plaintiffs’ appeal of the trial judgment.

[6] On August 2, 2023, almost eleven months after the plaintiffs filed the Notice of Motion, the Registrar dismissed the plaintiffs’ motion for leave to appeal costs.

[7] On August 18, 2023, counsel for the parties attended before Registrar Boehm, to settle the terms of the costs order. The plaintiffs’ lawyer of record, T. Dumigan of the firm of Gilbert’s LLP, attended but took no position as the firm had filed a motion to get off the record in October 2023. The Registrar denied Mr. Elinson’s request for an adjournment. It is not clear what draft order was before the Registrar. The Registrar settled the order and noted in the endorsement:

Mr. Elinson stated that he was seeking to challenge some of the content of the costs order, but counsel for the defendants advised that objections to content were raised in a Notice of Appeal, which was dismissed for delay (Emphasis in original text).

Pursuant to Rule 59.04(9) I have settled the order in the form I consider proper.

[8] Mr. Elinson subsequently objected to the Registrar signing the order, though no formal objection was filed before me. What is clear from the long running exchange of emails between Mr. Elinson and defence counsel, all forwarded to my judicial assistant, is that Mr. Elinson's objection is to the fact that he is also personally liable for the costs of the action. In fact, he made that fact clear at the appointment before me to settle the judgment, and in an email sent directly to the court on June 20, 2024, at 6:11 p.m. setting out his arguments on the eve of the attendance before me.

[9] The defendants on the other hand assert that they are merely settling the order in accordance with the process outlined by Myers J., in *Drennan v Drennan*, 2014 ONSC 141. In *Drennan*, Myers J. explained in detail the process of approving orders and the content contemplated by Form 59 C of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] Turning to the positions of the parties, I must reject each party's position. As I am *functus officio*, I am not able to entertain any of the arguments advanced by Mr. Elinson as his arguments have no bearing on whether the order for costs ought to be settled. Mr. Elinson says that he intends to bring a motion to have himself removed as a plaintiff in the action. I have also declined to provide Mr. Elinson with legal advice as it is not my role to do so but would encourage him to seek legal advice. Whether Mr. Elinson chooses to do so does not preclude me however from settling the order in accordance with r. 59.04(9) of the *Rules*. I am also declining Mr. Elinson's request, post attendance, to delay the settling of the order to accommodate his motion, for the same reason.

[11] As for the defendant's draft order submitted to be signed by me, I do not intend to sign it. I do not agree that the process for settling a judgment which Myers J. described with such meticulous detail and clarity in *Drennan* applies here. *Drennan* applies in circumstances where the draft order reflects the disposition made by the judicial official. The draft order presented by the defendants does not reflect my disposition on costs but rather reflects a compromise or agreement between the parties on my decision.

[12] In my Costs Endorsement, I made the following disposition:

- i. The plaintiffs shall pay the defendants partial indemnity fees in the amount of \$582,496.80 on the basis of Fasken's partial indemnity fees of \$516,496.80 and Wires Jolley LLP's partial indemnity fees of \$66,000, plus HST.
- ii. The plaintiffs shall pay the defendants disbursements in the amount of \$135,416.40.
- iii. The defendants shall pay the plaintiffs their costs of the counterclaim in the amount of \$19,500 plus HST.

[13] The preamble of the draft order makes it clear that the parties have agreed to compromise, stating, "and with the parties agreeing that the costs awarded in respect of the counterclaim be set-off against the costs awarded in respect of the action (emphasis added)". And paragraph one of the operative part of the draft order states:

1. THIS COURT ORDERS that the plaintiffs, Amelin Engineering Ltd. and Michael Elinson, shall pay to the defendants, Blower Engineering Inc. and Steam-Eng Inc., costs in the amount of \$636,186.38 (representing (\$582,496.80 plus HST) minus (\$19,500 plus HST)).

[14] If the defendants wish to enforce the agreement, their recourse is a motion to enforce the agreement.

[15] On the other hand, if the defendants wish to have a draft which reflects my disposition on costs of the action, then I would direct as follows:

- i. A copy of the draft order must be sent to the plaintiffs.
- ii. The plaintiffs have seven (7) days to respond to the draft order.
- iii. If the judgment is approved by the plaintiffs, the registrar can sign the order.
- iv. If the plaintiffs do not respond by the deadline, the draft order may be forwarded to my judicial assistant.

[16] The draft order should be submitted in Word and comply with the requirements of r. 59.03 of the *Rules*.

A.P. Ramsay J.

Date: June 24, 2024