CITATION: Primont Homes (Vaughan) Inc. v. Maplequest (Vaughan) Developments Inc., 2024 ONSC 4363
COURT FILE NO.: CV-18-00606799-0000
DATE: 20240802

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PRIMONT HOMES (VAUGHAN) INC., Plaintiff

AND:

MAPLEQUEST (VAUGHAN) DEVELOPMENTS INC. and 2373480 ONTARIO INC., Defendants

BEFORE: VERMETTE J.

COUNSEL: *Daniel A. Schwartz, Scott McGrath, Alexander Soutter and Jessica DeFilippis,* for the Plaintiff

William A. Chalmers and Codie Mitchell, for the Defendant Maplequest (Vaughan) Developments Inc.

Emilio Bisceglia and Adriana Di Biase, for the Defendant 2373480 Ontario Inc.

HEARD: In writing

ENDORSEMENT

[1] On April 2, 2024, I released an endorsement (2024 ONSC 1940):

a. dismissing the Defendants' motions for various relief in relation to an interim injunction granted in March 2019, except for the request of the Defendant Maplequest (Vaughan) Developments Inc. ("**Maplequest**") that the motion of the Plaintiff, Primont Homes (Vaughan) Inc. ("**Primont**"), for an interlocutory injunction and leave to issue a certificate of pending litigation be returned and heard on the merits; and

b. granting Primont's motion for an interlocutory injunction.

[2] The parties were not able to agree on costs and have delivered costs submissions.

Positions of the parties

a. Position of Primont

[3] Primont's position is that it is entitled to its costs of the Defendants' motions on a substantial indemnity basis. Primont argues that substantial indemnity costs are warranted because of the Defendants' delay in bringing their motions and their unproven allegations of fraud and dishonesty made against Primont and its principal. Primont also submits that it is entitled to its costs of its motion for an interlocutory injunction on a partial indemnity basis. Primont seeks costs in the total amount of $258,030.18, and asks that the costs be ordered payable by the Defendants jointly and severally.

[4] Primont submits that the nature of the motions justifies a significant costs award. It refers to the procedural background of the motions and the fact that there were multiple evidentiary disputes. It states that Maplequest sought to rely on every document exchanged in the proceeding which expanded the scope of the motions to involve the entirety of the action's procedural history.

[5] Primont points out that the Defendant 2373480 Ontario Inc. ("**237**") refused to concede that there was a serious issue to be tried, which led Maplequest to withdraw its concession on this point during oral argument. According to Primont, the Defendants' failure to admit what should have been admitted increased the complexity, time and resources needed to argue the motions. Primont submits that a failure to concede this point should be taken into consideration on costs.

[6] Primont states that the costs that it is seeking are consistent with other costs awards in complicated injunction motions. It argues that the Defendants cannot be heard to complain about the quantum of costs sought by Primont in light of the costs reflected in their respective costs outlines.

[7] Primont notes that the Defendants sought to dissolve the interim injunction 2.5 years after it was granted and that they offered no explanation for their delay in challenging the undertaking as to damages despite being aware of its alleged deficiencies since 2019. According to Primont, substantial indemnity costs are warranted where a party is responsible for inexcusable and unexplained delay.

[8] Primont states that unsupported allegations of fraud attract greater costs consequences. It gives examples of allegations made by the Defendants and argues that the making of such allegations against Primont, which were ultimately unproven, warrants an award of substantial indemnity costs.

[9] Primont submits that it is not possible to extricate the work done in responding to the Defendants' motions to dissolve the interim injunction from the work done in relation to Primont's motion for an interlocutory injunction. As a rough approximation, Primont has taken the entirety of its time incurred and seeks substantial indemnity costs for only half.

[10] Based on its costs outline, Primont's costs on a partial indemnity basis (i.e., 60% of its actual fees, plus HST and disbursements) total $197,500.28.[1]

b. Position of Maplequest

[11] Maplequest's position is that Primont is entitled to reduced partial indemnity costs due to its mixed success. Maplequest submits that Primont's partial indemnity costs should be reduced by 33%, and that the appropriate order is an award of costs to Primont on a partial indemnity basis in the all-inclusive amount of $100,000.00, payable by the Defendants, jointly and severally, within 30 days.

[12] Maplequest argues that the quantum of costs must reflect the fact that there was divided success in the proceeding. Maplequest states that the Court has discretion to reduce a costs award to reflect partial success where success is divided. According to Maplequest, there was clearly divided success on the motions because this Court found that Primont's motion for an interlocutory injunction and leave to issue a certificate of pending litigation had to be heard on the merits. Maplequest points out that Primont has insisted since November 2021 that its abuse of process argument was a full answer and defence to the Defendants' motions, and submits that this significantly increased the scope and costs of the motions.

[13] Maplequest states that the volume of material filed by Maplequest was as a result of Primont's argument that the delay in the hearing of Maplequest's motion and what happened in the course of the litigation constitutes an abuse of process, which argument was rejected by the Court.

[14] Maplequest submits that the cases relied upon by Primont are not closely comparable given Primont's divided success. It also notes that the reasonable expectations of the parties concerning the amount of a costs award is a relevant factor that informs the determination of what is fair and reasonable, but it is not the only or determinative factor and cannot be allowed to overwhelm the analysis of what is objectively reasonable in the circumstances of the case.

[15] Maplequest argues that delay alone does not justify an award of elevated costs. It also argues that the allegations it made against Primont in connection with its undertaking as to damages fall short of the requisite reprehensible, scandalous or outrageous conduct that reaches

[1] I note that in Primont's costs outline, the partial indemnity rates used are 50% of actual rates. However, in calculating the amount sought in its written submissions, Primont used partial indemnity rates that are 60% of actual rates (as noted in footnote 15). In light of the case law on this issue, Primont's written submissions and the fact that the Defendants both used partial indemnity rates that are 60% of actual rates, I have used partial indemnity rates that are 60% of actual rates to calculate Primont's costs on a partial indemnity basis.

the level of conduct that is deserving of sanction. Maplequest submits that there was nothing improper in the fact that the allegations were made or in the way that they were stated by counsel.

c. Position of 237

[16] 237's position is that the appropriate order is an award of costs to Primont on a partial indemnity basis in the all-inclusive amount of $100,000.00, payable jointly by the Defendants.

[17] 237 argues that the quantum requested by Primont, $258,030.18, is excessive and unreasonable. It points out that Primont's costs outline discloses that there were four lawyers and one law clerk working on and billing for the motions, while 237 had primarily two lawyers working on the motions, with a student helping on a very limited portion of the motions. 237 submits that having four lawyers – two of whom are senior lawyers – work on and bill for the motions was unnecessary, excessive and evidence of over-lawyering. 237 refers to three or four lawyers for Primont attending at case conferences, Rule 39 examinations and cross-examinations as examples of over-lawyering. 237 states that the increased and duplicative[2] costs resulting from such over-lawyering should not be borne by 237 and was not within its reasonable expectation.

[18] 237 submits that Primont's abuse of process argument was an unreasonable position to take in response to the Defendants' motions, and it unnecessarily increased the costs of the motions.

[19] 237 disputes that it should have conceded that there was a serious issue to be tried in the injunction analysis. 237 maintains that its position on this issue was reasonable, especially in light of the Court's acknowledgement that Primont does not have a particularly strong case.

[20] 237 states that there should be a 33% reduction of Primont's overall claim for costs. Such a reduction takes into account the unnecessary costs incurred on the abuse of process argument and the fact that Primont did not achieve full success on the motions.

[21] 237 argues that there is no basis to award substantial indemnity costs to Primont with respect to the motions. 237 disputes that there was delay in bringing the motions and submits that it acted prudently in bringing its motion after a determination of the Defendants' security for costs motions. 237 also disputes that substantial indemnity costs are warranted because of unsupported allegations of fraud against Primont. 237 points out that the Court did not make any actual findings with respect to 237's allegation that the undertaking as to damages provided by Primont was of little to no value. 237 further states that the case law shows that an allegation of fraud does not lead inexorably to an award of costs on a substantial indemnity basis. 237 maintains that its position regarding the undertaking as to damages was justified. According to 237, it did not engage

[2] While 237 refers to "duplicitous" costs in its costs submissions, I infer from the nature of the submissions that this word was used by mistake and that the correct word that 237 meant to use was "duplicative". Given the very different meanings of these words, 237 should be more careful in the future.

in any conduct which was scandalous, reprehensible or outrageous that would justify an award of substantial indemnity costs against it in the circumstances of this case.

d. Primont's reply submissions

[22] Primont submits that the Defendants' position that the costs payable to Primont should be reduced because Primont was unsuccessful in its argument that the Defendants' motions were an abuse of process should be rejected. Primont states that what the Defendants are asking for is a distributive costs award, which awards costs on an issue-by-issue basis, and Ontario courts have uniformly declined to grant distributive costs awards.

[23] Primont argues that there was no mixed success, and that it was entirely successful on the motions. Primont points out that the Defendants wanted the dissolution of the interim injunction and fought against the imposition of an interlocutory injunction, and they lost both.

[24] Primont states that even if it is appropriate to reduce costs because of mixed success – which it argues it is not – Maplequest's suggestion that a 33% reduction is appropriate because approximately 33% of Primont's argument in its factum addressed abuse of process is a novel approach without any basis in law or in fact.

[25] Primont submits that 237's argument that Primont over-lawyered this file is meritless. Primont states that it never had more than three lawyers present for case conferences, and often had only two. Primont points out that this was the same as Maplequest, which often had three lawyers attend case conferences. Primont argues that rather than count the number of lawyers who attended steps in the proceeding, one should count the hours that are claimed in the parties' respective costs outlines. Primont notes that 237 did not claim any hours for Rule 39.03 examinations and suggests that 237's decision to serve its costs outline only after the hearing of the motions affected what and how much 237 sought to include in its costs outline.

[26] Primont states that the costs it is claiming are much less than Maplequest's costs and are not significantly more than 237's costs, notwithstanding that 237 did not take the lead in the motions. Primont argues that to conclude that Primont over-lawyered simply because multiple lawyers attended various steps while ignoring the actual number of hours that Primont claimed compensation for in its costs outline would only serve to discourage lead counsel from having junior associates attend examinations or court appearances.

Discussion

a. Scale of costs

[27] As has been observed in many cases, costs on an elevated scale are exceptional and are reserved for those situations when a party has displayed reprehensible, scandalous or outrageous conduct: see *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*, 2021 ONCA 287 at para. 4.

[28] Cases where substantial indemnity costs were ordered as a result of allegations of fraud or other attacks on the integrity of a party, including the cases referred to by Primont in its submissions, are usually cases where there was a determination on the merits against the party alleging fraud or improper conduct.

[29] In this case, I did not deal with the merits of the allegations raised by Maplequest and 237 with respect to Primont's undertaking as to damages because I found that Rule 2.02 of the *Rules of Civil Procedure* prevented the Defendants from attacking the original undertaking as to damages provided by Primont.

[30] Since I did not make any findings as to whether the allegations of improper conduct were proven or unproven, I conclude that this is not an appropriate case for costs on an elevated scale. Further, I am of the view that the conduct of the Defendants in this case does not otherwise rise to the egregious level required to award costs on a substantial indemnity basis. The issue of delay is insufficient in this case to justify substantial indemnity costs.[3]

[31] Therefore, the appropriate scale of costs is partial indemnity.

b. Reduction of costs based on mixed success

[32] I disagree with Primont's submission that this Court cannot reduce costs because of mixed success. Doing so is not making a distributive costs award. That the Court can do so is expressly acknowledged in the very case that Primont relies upon in its Reply Costs Submissions with respect to distributive costs awards: see *Henry v. Zaitlen*, 2022 ONSC 3050 at paras. 26, 28, 29, 45. See also *Mount Royal Painting Inc. v. Unifor Canada Inc.*, 2022 ONSC 6316 at para. 82. In the exercise of its discretion under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the *Rules of Civil Procedure*, the Court is entitled to take into consideration, among other things, the time and expense involved in issues that were not successful.

[33] Further, and in any event, the fact that Primont was unsuccessful with respect to its abuse of process argument did have an impact on the result in this case because Maplequest's motion was granted in part, which made it necessary to hear Primont's motion on the merits.

[34] I also note that the context of ordering costs on a motion is different than the context of ordering costs after a trial, which is usually the context in which the decisions regarding distributive costs awards were made.

[35] I find that it is appropriate in this case to reduce Primont's costs to take into account the lack of merits of its abuse of process argument. While Maplequest's response to this argument

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[3] In *Hercules Moulded Products Inc. v. Rogers*, 2013 ONSC 8013 at para. 11, the case relied upon by Primont on the issue of delay, a finding was made that the delay in the prosecution of the action was "contumelious". No similar finding was made in this case.

may have been disproportionate to some extent, Primont's argument added an unnecessary layer to the motions that the Defendants were required to address. Primont's refusal to concede that it needed to obtain an interlocutory order unnecessarily complicated the motions: see Rules 57.01(1)(e) and (g).

[36] Although I am of the view that the 33% reduction proposed by the Defendants is too high in the circumstances of this case, I will consider Primont's lack of success with respect to its abuse of process argument when determining the appropriate quantum of costs.

c. Quantum

[37] While the reasonable expectation of the parties is a relevant factor that informs the determination of a fair and reasonable quantum of costs, my view is that this factor plays a limited role in this case. In light of the history of this matter and the costs outlines of the Defendants, I find that the costs sought by Primont on a partial indemnity basis are generally within the reasonable expectations of the Defendants.

[38] The factor of the reasonable expectations of the parties is not a determinative factor. This Court's obligation is to fix an amount of costs that is objectively reasonable, fair and proportionate for the unsuccessful party to pay in the circumstances of the case. See *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587 at paras. 61-63.

[39] I have reviewed Primont's costs outline. In my view, the hourly rates used are reasonable and appropriate.

[40] However, Primont's costs outline includes numerous timekeepers. Considering the number of timekeepers involved and the number of hours spent on the different tasks, it is necessary to apply a reduction to the amount sought to take into account the inevitable duplication of work between the timekeepers involved and to ensure that the overall time claimed is reasonable in light of all the circumstances of this case. I note that I would have done the same thing with respect to Maplequest had Maplequest been entitled to costs.

[41] While experienced lawyers should be encouraged to involve junior associates in their cases for training/experience purposes, this does not mean that it is appropriate for an unsuccessful party to have to pay costs for duplicative time or work. Law is a profession and this means that lawyers have professional obligations that, in some cases, cannot be monetized, especially when this impacts an opposing party.[4]

[42] Taking the foregoing into account – including the fact that Primont was unsuccessful with respect to its abuse of process argument, as well as the factors set out in Rule 57.01(1) of the *Rules*

[4] For instance, a party who chooses to retain a sole practitioner should not have to pay costs relating to the training of the junior associates in the medium or big firm retained by an opposing party.

of Civil Procedure and the reasonable expectations of the parties, I find that the fair and reasonable award of costs in favour of Primont is on a partial indemnity basis in the all-inclusive amount of $140,000.00.

Conclusion

[43] The Defendants are ordered jointly and severally to pay costs on a partial indemnity basis to the Plaintiff in the amount of $140,000.00 within 30 days.

Vermette J.

Date: August 2, 2024