CITATION: Rastin v. Hoag Family Farms Ltd. et al, 2024 ONSC 4882
COURT FILE NO.: CV-22-000250
DATE: 2024/09/04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KYLE JOSEPH RASTIN, Plaintiff

AND:

HOAG FAMILY FARMS LTD. and JONATHAN HOAG, Defendants

BEFORE: Justice M.A. Cook

COUNSEL: M. Bronsveld, Counsel for the Plaintiff

S. Nash, Counsel for the Defendants

HEARD: In Writing

COSTS ENDORSEMENT

[1] On July 22, 2024, I made an order compelling the plaintiff to answer certain undertakings made on his examination for discovery and directing him to reattend on his examination to answer questions arising from his answers.

[2] In my endorsement, I invited the parties to make brief written costs submissions in the event that they were unable to resolve the matter of costs between them. However, I directed any party seeking costs to address in their costs submissions why costs should be awarded despite the fact that there is no discovery plan made in this case.

[3] The Defendants seek their partial indemnity costs of the motion in the amount of $19,249.65 inclusive of disbursements and HST. The Defendants say that they were the successful party on the motion and that they are presumptively entitled to costs due to their success. The Defendants submit that the parties are equally responsible for discovery planning, and that the absence of a discovery plan should not disentitle them to their costs of the motion.

[4] The Plaintiff asks that I make an order that the parties bear their own costs in light of the divided success on the motion and the Defendants' failure to engage in any form of discovery planning prior to examining the Plaintiff for discovery.

General principles

[5] Costs of court proceedings are discretionary: ss. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended.

[6] The fundamental purposes of awarding costs are to (1) partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate litigation behavior by litigants: *Serra v. Serra*, 2009 ONCA 395 at para. 8.

[1] Consideration of any claim for costs is guided by Rule 57.01 and Tariff A to the *Rules of Civil Procedure*: r. 57.01(3). Rule 57.01 provides that, in exercising its discretion to award costs, the Court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing, any matter relevant to the issue of costs including:

> (0.a) 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;
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> (0.b) 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;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
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> > (i) improper, vexatious or unnecessary, or
> >
> > (ii) taken through negligence, mistake or excessive caution;
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> (g) a party's denial of or refusal to admit anything that should have been admitted;
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> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> > (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> >
> > (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
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> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

[2] As Rule 57.01 suggests, fixing costs is not a simple mechanical or mathematical calculation. Rather, costs claims require the court to stand back from the amounts calculated from the time spent and the hourly rates of time keepers, and assess the reasonableness of the claim from the perspective of the reasonable expectations of the losing party: *Boucher v. Public Accountants Council of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 48 C.P.C. (5th) 56 and *Moon v. Sher*, 2004 CanLII 39005 (ON CA), [2004] O.J. No. 4651, 246 D.L.R. (4th) 440.

Analysis and Discussion

Success on the Motion

[3] The Defendants submit that they were largely successful on the motion, and point to the fact that they obtained an order compelling the Plaintiff to answer undertakings and refusals in six of the eight categories advanced on the motion.

[4] The Plaintiff submits that success on the motion was divided, and asks that I consider, among other things, that he was called upon to respond to issues not pursued at the hearing, and successfully defended his privilege over the file of Mr. Jassal, and against the Defendants reuqests for his tax information and medical documents.

[5] Determining the issue of success on a motion is not simply an issue of dividing up the issues before the court on the basis that each had equal importance to the parties or the court.

[6] The Defendant was successful with respect to the undertakings and refusals in categories 1, 3, 4, and 8. The issue to be decided in relation these categories was the extent to which the Plaintiff was required to particularize his claim and identify the evidence he relies on to prove his case. The issue of particularization was important to the Defendants. Fundamental procedural fairness was in issue and this was an essential motion within the meaning of rule 57.01(d).

[7] At the same time, the Plaintiff was successful in defending his refusal to answer most of the questions in categories 5, 6 and 7. The Plaintiff reasonably refused to answer questions that would require him to waive the solicitor-and-client privilege attaching to the file of Mr. Jassal, and further reasonably refused to answer questions that were disproportionate to or irrelevant to the issues in the action. The issue of solicitor-and-client privilege is a substantive right of obvious importance to the Plaintiff. The privilege at issue was also enjoyed by Chandrith Yin, who was not served with the motion. While the Defendants withdrew these questions during the motion, the Plaintiff was nevertheless successful in relation to these issues.

[8] Overall, I find that the Defendants were the more successful parties on the motion and are presumptively entitled to their costs, albeit with some reduction to reflect their somewhat divided success.

[9] The Defendants' costs outline claims actual fees of $29,272.65 and fees on a partial indemnity scale of $19,249.65, both inclusive of GST plus disbursements of $339.00 for a total of $29,611.65 actually incurred and $19,249.65 on a partial indemnity scale. The plaintiff asks for partial indemnity costs of $19,249.65. The Defendants were represented in the motion by Samuel Nash, who was called to the bar in 2014 and charges his time at $450.00 per hour, and Dillon Beaulne, who was called to the bar in 2018 and charges his time at $330.00 per hour. Messrs. Nash and Beaulne were assisted by a junior associate and a law clerk.

[10] The Plaintiff submits that the fees claimed by the Defendants are excessive. The Plaintiff has presented a costs outline setting out his actual costs of $23,841.87 inclusive of HST, with no disbursements. Similar to Defendants' counsel, Plaintiff's counsel billed his time at a rate of $310.00 per hour and had assistance from junior counsel and a law clerk. While the Plaintiff does not challenge the hourly rates charged by Defendants' counsel, he objects to what he describes as excessive time, in excess of 100 hours, spent on the motion. Plaintiff's counsel spent 75.6 hours on the motion.

[11] I agree with the Plaintiff that the time claimed on the motion is somewhat excessive. On my view of the costs outline, it appears that a fairly substantial amount of time was spent communicating with the Defendants.

[12] Subject to consideration of the lack of any discovery plan in this case, discussed further below, I find that the fair and reasonable costs of the defendant on this motion, on a partial indemnity scale and in light of the somewhat divided success, would be $15,000.00 inclusive of disbursements and HST.

Other Relevant Matters: No Discovery Plan

[13] In support of their request for costs, the Defendants submit that the motion was exceptionally time-consuming and expensive due to the "the number of undertakings left unanswered, and improperly or inconsistently answered by the Plaintiff". I disagree. In my view, the real reason the motion was necessary was because the parties failed entirely to engage in any kind of discovery planning.

[14] Rule 29.1 came into force on January 1, 2010. Rule 29.1.03(2) required the Defendants, before conducting an examination for discovery of the Plaintiff, to enter into a discovery plan.

[15] Rule 29.1.03 is not new. It is mandatory.

[16] In *Lecompte v Doran*, 2010 ONSC 6290 (CanLII), Master McLeod explained that the mandatory "[d]iscovery planning is intended to permit the parties to map out the most efficient and effective way to organize the production and discovery needs of the particular action having regard to the complexity of the records, the issues in dispute and the amounts at stake. It cannot be an adversarial exercise."

[17] As I indicated in my endorsement, this discovery motion was a "textbook example of the inefficiency, delay and needless cost involved when discovery is approached in an adversarial manner and with cavalier disregard to the parties' mutual obligation to engage in discovery planning". The Plaintiff provided an affidavit of documents *two years* prior to the Defendants' examination of the Plaintiff for discovery. At no time during those two years did the Defendants identify perceived deficiencies in the Plaintiff's productions or seek further production or particulars. Instead, counsel for the parties consumed a great deal of time during the Plaintiff's examination for discovery (and in this motion) arguing about the discovery needs of this particular action in light of the issues in dispute and principles of proportionality.

[18] I am mindful that both the Plaintiff and the Defendants are responsible for discovery planning, and that I should consider the conduct of both parties in contributing to the circumstances giving rise to the motion (*Guest v. Hirst*, 2012 ONSC 86 (CanLII), para. 20; *Ornstein v. Starr*, 2011 ONSC 4220 (CanLII), para. 30. Since *Guest v. Hirst*, however, the Supreme Court of Canada has recognized that a culture shift is needed to support timely and affordable access to civil justice and the rule of law: *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 at paras. 1-2.

[19] Discovery planning, as mandated by r. 29.1.03, is more important now than ever. Rule 29.1.03 may be honoured more in the breach than the observance but it is a rule of court, and one that was introduced to address a clearly identified need to move matters efficiently through discovery toward resolution.

[20] The potential cost consequences of failing to engage in discovery planning are expressly set out in r. 29.1.05. In the absence of any consequence for what I can only describe as the Defendants' unapologetic non-compliance with r. 29.1.03, the court can expect the bar to continue to cavalierly disregard their discovery planning obligations and, more importantly, continue to consume scarce and valuable court resources in resolving avoidable discovery disputes.

[21] Having regard to all the cost considerations outlined in Rule 57.01(1) of the *Rules of Civil Procedure*, I am most influenced by my view that the Defendants were the more successful party in the motion, but the motion ought to have been unnecessary had the Defendants observed their discovery planning obligations.

[22] For all the foregoing reasons, the Defendants shall have their costs of the motion fixed in the amount of $5,000.00 inclusive of HST.

Justice M.A. Cook

Date: September 4, 2024