CITATION: Correa v. Valstar Homes (Oakville Sixth Line) Inc. 2024 ONSC 5184
COURT FILE NO.: CV-22-00000966
DATE: 2024-09-18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ivy Zeena Correa and Alwin Correa, Plaintiffs

AND:

Valstar Homes (Oakville Sixth Line) Inc., Defendant

BEFORE: Kurz J.

COUNSEL: Paul Starkman, Counsel for Plaintiffs

William Chalmers, Counsel for Defendant

HEARD: In Chambers

COSTS ENDORSEMENT

[1] On June 21, 2024, I dismissed the motion of the Plaintiffs (the Purchasers") for summary judgment against the Defendant ("Valstar") on their claim for damages of $113,000. I further granted the summary motion of the Defendants ("Valstar") and dismissed this action: 2024 ONSC 3616.

[2] The Purchasers' claim was for the return of a "revival fee" on an expired agreement of purchase and sale ("APS") for a home built by Valstar. The key issue in the motion and the action was the effect of a "time is of the essence" clause in that agreement. I accepted Valstar's interpretation of the terms of the APS.

[3] Valstar seeks its costs of the motion and action, which total $57,953.69 inclusive of taxes and disbursements. Most of this, $50,269.50 is substantial indemnity fees for the period after Valstar served its offer to settle on June 21, 2022. Valstar's partial indemnity costs for the period before it made its offer was $855. The balance is taxes and disbursements.

[4] Valstar argues that its offer of $1,000 plus costs of $750 should have been immediately accepted. It points out that it provided a copy of the Court of Appeal decision in *3 Gill Homes Inc. v. 5009796 Ontario Inc. (c.o.b. Kassar Homes),* 2024 ONCA 6, which I relied upon in my decision, to the Purchasers, when it resent its original offer to settle along with the evidence it relied upon in this motion.

[5] The Purchasers say that their substantial indemnity costs are $19,984.05 and partial indemnity costs are $14,643.10. The Purchasers say that the Defendants' costs should be no more than $15,000.

Authorities Regarding the Determination of Costs

[6] Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 grants this court the discretion to determine the costs of a proceeding or step in a proceeding. It states:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a 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.

[7] The Ontario Court of Appeal has stated that "[m]odern cost rules are designed to foster three fundamental purposes: (1) to indemnify successful litigants for the cost of litigation; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants": *Fong v. Chan* (1999), O.J. No. 4600 (Ont. C.A.) at para. 22.

[8] In *394 Lakeshore Oakville Holdings Inc. v. Misek*, [2010] O.J. No. 5692 (Ont. S.C.J.), at para. 10 Perell J. of this court reformulated and supplemented those purposes as follows: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage the sanctioning of inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements. (See also: *Talwar v. Grand River Hospital Board of Directors*, 2018 ONSC 6645 (Ont. Div. Ct.).

[9] It is important to note that both decisions articulated the view that the goals of an award of costs are not limited to indemnity. There are broader, discretionary considerations involved, which are articulated in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] Under r. 51.07(7), the court is to "... devise and adopt the simplest, least expensive and most expeditious process for fixing costs ...". The general principles for the exercise of my discretion in determining costs are set out in r. 57.01(1). They include:

- The result of the proceeding; i.e. success. It is trite that there is a presumption that the successful party is entitled to their costs.
- However, a court is entitled to award costs against the successful party in the appropriate circumstances (r. 57.01(2)). That may particularly be so when the court grants an indulgence to a party. In the oft-repeated comment of Hawkins, D.C.J., in *Fox v. Bourget*, [1987] O.J. No. 2326 (Ont. D.C.): "the price of a granted indulgence is the payment of the costs of those who have sought, unsuccessfully, to prevent its being granted."
- offers to settle,
- the principle of indemnity,
- the reasonable costs expectations of the unsuccessful party for the step for which costs are claimed,
- the amounts claimed and recovered in the proceeding,
- the apportionment of liability,
- the complexity of the proceeding,
- the importance of the issues,
- the conduct of any party that tended to shorten or unnecessarily lengthen the proceeding,
- whether any step in the proceeding was taken improperly, vexatiously, unnecessarily, through negligence, mistake, or unnecessary caution;
- a party's denial or refusal to admit anything that should have been admitted,
- whether the dispute between the parties had been unnecessarily divided into more than one proceeding;
- any other matter relevant to the determination of costs.

1. Those factors reflect the general principle set out in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (O.C.A.). There, the Ontario Court of Appeal stated at para. 24 that costs awards should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties." That amount is not necessarily based on what the successful counsel is entitled to charge their client: *Coldmatic Refrigeration of Canada v. Levtek Processing*, [2005] O.J. No. 160 (Ont. C.A.),

[11] In *Apotex Inc. v Eli Lilly Canada Inc*., 2022 ONCA 587, at para. 65, Roberts J.A., writing for the Court of Appeal for Ontario stated that

> **65** Costs that are reasonable, fair, and proportionate for a party to pay in the circumstances of the case should reflect what is reasonably predictable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend.

[12] Roberts J.A. added at para. 66 that: “[t]he party seeking costs bears the burden of proving them to be reasonable, fair, and proportionate…The material provided for the assessment must allow the court to come to a conclusion as to the amount of time reasonably required by the party seeking costs to deal with all aspects of the proceedings for which costs are claimed, including whether there was over-lawyering or unnecessary duplication of legal work”.

[13] Valstar seeks enhanced costs in light of its offer to settle soon after this action was commenced. Rule 49.10 sets out the principles that apply to costs in the face of an offer to settle. It reads as follows:

> ***COSTS CONSEQUENCES OF FAILURE TO ACCEPT***
>
> **Plaintiff's Offer**
>
> 49.10(1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

. . . . .

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[14] In *Davies v. Clarington (Municipality)*, 2009 ONCA 722, Epstein J.A., writing for the Court of Appeal of Ontario, summarized the principles set out in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, regarding the entitlement to enhanced costs in the face of offers to settle. She wrote:

> [16] Rule 49 deals with a specific aspect of costs: it is a self-contained scheme that addresses the manner in which offers to settle are brought into play. Its objective is to promote an offer of compromise and visit a cost consequence upon an offeree who rejects an offer that turns out to be as favourable as or more favourable than the judgment awarded to a plaintiff at trial.

[15] It may seem incongruous that under Rule 49.10, a Plaintiff who obtains a judgment that is equally or more favourable than their offer is in a better position regarding costs than a Defendant when the judgment is equally or more favourable than their offer. But that is the scheme of the rule: *Re Conforti*, 2015 ONCA 708, at para. 17, citing *St.*

Elizabeth Home Society v. Hamilton (City), 2010 ONCA 280, at para. 90. The only exception allowing for elevated costs will come "on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made": *Davies v. Clarington (Municipality),* at para. 40.

[16] Here I find that there was nothing reprehensible or even unreasonable in the conduct of the Purchasers. While I sided with Valstar, the position that it took was at least arguable.

Analysis

[17] Here, there is no question that Valstar is the successful party and that it "beat" its offer. I also reject the Purchasers' objection to being required to pay the costs of the action as well as the motion because such costs were outside its reasonable contemplation. They say that because Valstar did not move for summary judgment to dismiss their claim. But they are represented by experienced counsel. They should know that once they bring their summary judgment motion, it is open to the court to grant summary judgment to the other party: *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215 at para. 14; *Whalen v. Hillier* (2001), 53 O.R. (3d) 550 (C.A.), *Gnys (cob Health Services Recovery Network) v Narbutt*, 2016 ONSC 2594 [2016] O.J. No 2592 (Ont. Div. Ct.). I add, though, that most of the work performed in this case related to the summary judgment motions.

[18] Mr. Chalmers is an experienced counsel who obtained an excellent result for his client. His actual rate of $750 per hour (increased to $825/hr. in 2024) is reasonable for counsel of his level of experience and competence. His Bill of Costs mainly consists of claims at the substantial indemnity rate. However he cites a partial indemnity rate of $450/hr. until 2024 when it rises to $495. I accept those amounts as reasonable.

[19] Regarding the proportionality of his costs claim in regard to the fact that this is a simplified proceeding lawsuit regarding $113,000, Valstar argues, citing *Dang v. Anderson*, 2017 ONSC 2150, at paras. 12-13, that "[p]roportionality should not be used as a sword used to undercompensate a litigant for costs legitimately incurred (*Aacurate*

General Contracting Ltd. v. Tarasco, 2015 ONSC 5980 (S.C.J.) at para. 13 to 17).” That being said, proportionality remains one of the lodestar principles in the setting of costs.

[20] When comparing the two bills of costs. I note one substantial difference is that an articling student performed the bulk of the work for the Purchasers while Mr. Chalmers performed the bulk of work for Valstar. The difference in their billing rates represents a great part of the difference in the two bills of costs. Further, I am not limited by the costs incurred by the losing party; the winning party won for a reason.

[21] Considering all of the factors cited above, I find that a fair and reasonable amount that should be paid by the Purchasers is $30,000, inclusive of HST and disbursements. The Purchasers shall pay that amount within 30 days.

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Marvin Kurz J.

Released: September 18, 2024