

COURT OF APPEAL FOR ONTARIO

CITATION: Williams v. VAC Developments Limited, 2024 ONCA 821

DATE: 20241107

DOCKET: COA-23-CV-1093

Miller, Trotter and Copeland JJ.A.

BETWEEN

Agin Williams

Plaintiff/Defendant by Counterclaim
(Respondent)

and

VAC Developments Limited

Defendant/Plaintiff by Counterclaim
(Appellant)

Thomas McRae, for the appellant

Melissa Mustafa, for the respondent

Heard: September 18, 2024

On appeal from the order of Justice Heather A. McGee of the Superior Court of Justice, dated September 21, 2023, with reasons reported at 2023 ONSC 4679, and from the costs order dated November 20, 2023, with reasons reported at 2023 ONSC 6561.

COSTS ENDORSEMENT

[1] VAC Developments Limited's ("VAC") counterclaim against Mr. Williams was dismissed on a motion brought pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. By reasons for decision dated September 26, 2024, this court dismissed VAC's appeal from that judgment. We invited the parties to make written submissions on costs of the appeal and on VAC's motion for fresh evidence if the parties were unable to come to an agreement.

[2] The parties were unable to agree.

[3] Mr. Williams seeks costs of the appeal in the amount of \$39,905.95, and costs of responding to the motion for fresh evidence in the amount of \$7,514.50, representing his costs on a full indemnity basis. His costs, on a partial indemnity basis, are \$23,943.57 for the appeal and \$4,508.70 to respond to the motion for fresh evidence.

[4] We see no grounds on which to award full indemnity costs to the respondent. Mr. Williams was successful in this appeal, but has pointed to no factors that would justify a heightened costs award. We consequently award costs of the appeal to Mr. Williams on a partial indemnity basis.

[5] VAC argues that the quantum of the costs on appeal should be no more than \$15,000, and there should be no costs awarded on the motion for fresh evidence.

[6] Mr. Williams' bill of costs does not appear excessive, and VAC's objection is simply that it ought to be less. Having reviewed the parties' submissions and Mr. Williams' bill of costs, we order that costs of the appeal are payable by VAC to Mr. Williams in the amount of \$23,900 inclusive of HST and disbursements.

[7] With respect to the motion for fresh evidence, it was occasioned by Mr. Williams having referred in his factum to litigation brought by VAC against counsel for Mr. Williams, Mr. Lakhani. That reference was in support of an argument that VAC had a practice of using litigation strategically to silence critics. The allegation was unsupported by the record before this court, and ultimately it was disregarded by this court on that basis.

[8] Nevertheless, VAC argued that the allegation, once raised, had to be addressed. VAC did so by bringing the motion to introduce fresh evidence of a transcript of a cross-examination of Mr. Lakhani in the other proceeding and seeking relief from the deemed undertaking rule. It did so on notice to Mr. Lakhani, who then retained counsel and intervened as a third party on the appeal to contest the admission of the fresh evidence.

[9] The fresh evidence motion was dismissed on the basis that, once the court determined to disregard the paragraph in Mr. Williams' factum, the fresh evidence was not relevant to any live issue before the court.

[10] VAC argues, correctly, that had Mr. Williams not made the unsupported statement in his factum, the motion would have been unnecessary. But the motion was unnecessary in any event, as the appropriate response to the unsupported statement was to argue that it was unsupported and could not be relied upon in responding to the appeal.

[11] Accordingly, Mr. Williams is entitled to costs of responding to the motion, but at a reduced amount of \$3,000, all inclusive.

[12] Mr. Lakhani is similarly entitled to an award of costs against VAC for having to respond to the motion. He seeks \$7,500. That amount is reduced to \$3,000, all inclusive, on the basis that Mr. Lakhani bears some responsibility for raising the unsupported statement about VAC's strategic use of litigation.

DISPOSITION

[13] Mr. Williams is awarded costs of the appeal in the amount of \$23,900 inclusive of HST and disbursements, and costs of the motion in the amount of \$3,000 inclusive of HST and disbursements. Mr. Lakhani is awarded costs of the motion, payable by VAC, in the amount of \$3,000, inclusive of HST and disbursements.

“B.W. Miller J.A.”
“Gary Trotter J.A.”
“J. Copeland J.A.”