

CITATION: Eleoff v. Adamczyk, 2024 ONSC 4423
COURT FILE NO.: CV-23-00690126-0000
DATE: 20240808

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARK ELEOFF, Plaintiff

AND:

DAVE ADAMCZYK, ZBIEGNEW ADAMCZYK, MALGORZATA
ADAMCZYK and NATALIE ADAMCZYK, Defendants

BEFORE: VERMETTE J.

COUNSEL: *Chris Maggiras*, for the Plaintiff

R. Christopher M. Belsito, for the Defendants

HEARD: In writing

ENDORSEMENT

[1] On June 3, 2024, I released an endorsement (2024 ONSC 3167) granting the Defendants’ motion for summary judgment and dismissing the action.

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

A. POSITIONS OF THE PARTIES

1. Position of the Defendants

[3] The Defendants seek costs on a substantial indemnity basis in the amount \$31,438.35.

[4] The Defendants submit that they are entitled to costs on a substantial indemnity basis because the result of the motion is more favourable to the Defendants than the terms of the offer to settle that they served on the Plaintiff on January 20, 2023. The offer to settle provides that “[t]he Defendants shall consent to an Order obtained by the Plaintiff at his sole expense, dismissing the within action on a with prejudice without costs basis.” The offer to settle was served after the delivery of the Statement of Defence, but before any steps were taken with respect to the motion for summary judgment.

[5] The Defendants state that the costs that they are seeking are reasonable, proportional to the issues in the action and consistent with the factors set out in Rule 57 of the *Rules of Civil Procedure*. The Defendants note that the amount sought by the Plaintiff in the action was

significant. They argue that, as a result, the Plaintiff could reasonably expect to pay the Defendants costs of \$31,438.35 in the event that he was unsuccessful.

[6] The Defendants submit that the Plaintiff acted unreasonably by refusing to accept the Defendants' offer to settle and conducted himself in a manner worthy of an award of substantial indemnity costs. The Defendants state that the Plaintiff's claim was ill-founded, frivolous and stood no reasonable chance of succeeding. They argue that the Plaintiff is a financial bully who was using the litigation as a means of exacting retribution against the Defendants for choosing not to sell him the property in issue. The Defendants' position is that the Plaintiff must bear the consequences of his decisions and pay the Defendants their substantial indemnity costs.

2. *Position of the Plaintiff*

[7] The Plaintiff submits that the fair and reasonable costs award to the Defendants should be in the amount of \$13,334.00.

[8] The Plaintiff argues that the Defendants' claim for costs involves excessive time spent, an excessive hourly fee for the Defendants' lawyer's law clerk, and unnecessary duplication of effort. The Plaintiff's position is that the appropriate hourly rate for a law clerk ought to be no more than \$80.00 on a substantial indemnity basis. The Plaintiff submits that the Defendants' bill of costs reflects excessive time spent and duplication of effort with respect to the categories "Preparation and Service of Statement of Defence, etc.", "Preparation of Within Motion for Summary Judgment [...]" and "Preparation for and Attendance at Motion Hearing".

[9] I note that the Plaintiff did not provide a costs outline or bill of costs. Further, the Plaintiff does not appear to dispute the scale of costs requested by the Defendants (i.e., substantial indemnity) in his costs submissions.

B. DISCUSSION

1. *Scale of costs*

[10] As pointed out above, the Plaintiff does not argue against the substantial indemnity scale of costs requested by the Defendants.

[11] However, it is my view that the costs consequences set out in Rule 49.10 of the *Rules of Civil Procedure* are not triggered in this case. Rule 49.10(2) applies to offers made by a defendant, but it applies when "the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle". Here, the Plaintiff did not obtain any judgment because the action was dismissed.¹ The fact that Rule 49.10(2) only applies when the plaintiff obtains a judgment is

¹ I note that there are additional difficulties with the Defendants' claim for costs based on their offer to settle. Their offer to settle includes a requirement to sign a release, which can be problematic: see, e.g.,

made clear by the fact that, under Rule 49.10(2), the plaintiff is entitled to partial indemnity costs to the date the offer was served. A plaintiff who is completely unsuccessful is usually not entitled to any costs.

[12] Nevertheless, I may take into account the Defendants' offer in exercising my discretion with respect to costs in this case: see Rule 49.13. It is my view, however, that the Defendants' offer to settle should not have a significant impact on the issue of costs because the element of compromise in it was limited and required the Plaintiff to agree to the complete dismissal of the action.

[13] In addition to their offer to settle, the Defendants also rely on the Plaintiff's conduct in support of their request for costs on a substantial indemnity basis. 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.

[14] In my view, the conduct of the Plaintiff in this case does not rise to the egregious level required to award costs on an elevated scale. Hard-fought litigation is insufficient to justify an elevated costs award. While I did not agree with the Plaintiff's position, this is not a case where the process of the court was abused. See *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at paras. 42-46.

[15] Accordingly, the appropriate scale of costs in this case is partial indemnity.

2. *Quantum*

[16] As set out above, the Plaintiff is very critical of the quantum of costs sought by the Defendants. However, the Plaintiff is not in a position to criticize the hourly rates of, or time spent by, the Defendants' lawyer. Although the unsuccessful party is not obliged to disclose what they expended on costs, an attack on the quantum of the opponent's claim for costs without disclosing one's own bill of costs "is no more than an attack in the air": see *United States of America v. Yemec*, 2007 CanLII 65619 at para. 54 (Ont. Div. Ct.).

[17] Nevertheless, this Court has the obligation 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.

[18] I have reviewed the Defendants' bill of costs. In my view, the hourly rate of the Defendant's lawyer is reasonable. However, in light of my conclusion on the issue of the

Kidane v. City of Toronto, 2024 ONSC 4267 at paras. 14-15. Further, the Defendants claim substantial indemnity costs for the period preceding the service of their offer to settle, which is not how Rule 49.10 works.

appropriate scale of costs, a partial indemnity rate (i.e., 60% of the actual rate) must be used. I agree with the Plaintiff that the hourly rate used for the law clerk is excessive.

[19] With respect to the issue of time spent, I find that it is necessary to apply a reduction to the amount sought by the Defendants to: (a) take into account potential duplication of work between the timekeepers involved and potential claims for work of an administrative nature, and (b) ensure that the overall time claimed is reasonable in light of all the circumstances of this case.

[20] Taking the foregoing into account, as well as the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure* and the reasonable expectations of the parties, I find that it is fair and reasonable in this case to award costs in favour of the Defendants on a partial indemnity basis in the all-inclusive amount of \$22,000.00.

C. CONCLUSION

[21] The Plaintiff is ordered to pay costs to the Defendants on a partial indemnity basis in the amount of \$22,000.00 within 30 days.

Vermette J.

Date: August 8, 2024