CITATION: Hanna Homes Construction Inc. v. Maseh, 2024 ONSC 5919
COURT FILE NO.: CV-23-704304
DATE: 2024 10 25

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: HANNA HOMES CONSTRUCTION INC., *Plaintiff*

- and -

KYROLLOS MASEH, MARINA TANIOUS and CANADIAN IMPERIAL BANK OF COMMERCE, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: L. Wise, *for the defendants, Kyrollos Maseh and Marina Tanious (moving parties)*

D. Cameletti, *for the plaintiff*

HEARD: July 22, 2024 (by videoconference)

COSTS ENDORSEMENT

[1] This costs endorsement arises from a motion by the defendants, Kyrollos Maseh and Marina Tanious, seeking to discharge the plaintiff's lien and dismiss this action by reason of the plaintiff's failure to comply with my prior order. That order, made on consent, required the plaintiff to provide answers to particular outstanding undertakings from an April 2023 cross-examination pursuant to s. 40 of the *Construction Act*, RSO 1990, c C.30 within forty-five days and pay costs of the motion within thirty days. When this motion was initially brought, the plaintiff was in breach of that order. Alternatively, the moving defendants sought an order directing that the plaintiff comply with my order.

[2] Prior to the motion hearing, the plaintiff provided answers and paid the principal of the costs award. The parties thereafter resolved the motion on terms requiring further answers to specific questions asked on the cross-examination. The substantive relief discharging the plaintiff's lien and dismissing this action was not pursued. The parties were unable to agree on costs. Rather than deal with costs at the motion hearing, counsel asked to make written costs submissions. I denied that request and, after a recess, heard the parties' costs submissions.

[3] The moving defendants seek their partial indemnity costs in the amount of $29,825.60, including HST and disbursements. The plaintiff argues that those costs are excessive and that the moving defendants have "gone overboard". The plaintiff submits that there should be no costs

awarded, with each side bearing their own costs, since the parties resolved the motion themselves. That included the plaintiff agreeing to new disclosure requests. Although no costs are pursued by the plaintiff, its own costs outline discloses partial indemnity costs of $17,934.50, including HST and disbursements.

[4] As noted in my endorsement on the moving defendants' prior motion in January 2024, when it becomes necessary for the court to be involved to deal with outstanding undertakings and refusals, the party who has failed to answer an undertaking or taken an improper position with respect to a refusal can anticipate a costs award going against them: *Pullano v. Hinder*, 2017 ONSC 5734 at para. 4. However, while a successful party has a reasonable expectation that it will be awarded costs in its favour, it does not have a right to costs: *Brian Stucco Construction Inc. v. Nili-Ardakani*, 2021 ONSC 8541 at para. 10 (citing *Calibur Tool v. Ecotemp Manufacturing*, 2020 ONSC 2511).

[5] Since the parties' settlement was on specific terms, but for costs, I asked both sides to make submissions on whether the principles discussed in *Muskala v. Sitarski*, 2017 ONSC 2842 apply in this case. In that case, at paras. 5-10, Myers J. made several observations about awarding costs when parties have settled "except for costs", as follows:

(a) If parties are willing to settle and "throw the dice" on costs, then the parties are actually willing to settle without costs;

(b) If the goal of asking for costs is only to "poke the other side in the eye *en passant*", then that is not an action conducive to settlement;

(c) Costs are not themselves the subject of a parties' dispute, but rather are an incident of the determination of the parties' rights, flowing directly from the court's decision;

(d) Where parties have settled their dispute, there is usually no way for the court to make necessary findings of fact to support a costs determination, such as assessing whether parties' respective positions were reasonable. A party's reasons for settling is typically unknown to the court. A defendant may well have good defences, but choose to consent for other reasons such as establishing their *bona fides* or buying peace; and

(e) Where parties are not prepared to incur the time, cost, or risk of arguing a motion on the merits solely because they have not settled costs, uploading the disembodied decision on to the court is equally not a proportional or efficient use of court time.

[6] The moving defendants argue that this case is distinguishable from *Muskala* since there is a complete record and no disembodied decision. They point to the decision in *Smith v. Rotalec*, 2023 ONSC 6375 at paras. 13-15, in which Brown A.J. awarded costs to the moving plaintiff despite a consent resolution of the substantive motion. In doing so, Brown A.J. specifically pointed out that he had all of the motion materials before him and had prepared for the motion on an opposed basis (which is how it had been confirmed). Brown A.J. held that the record supported almost certain success on the motion for the moving plaintiff. The moving defendants submits that the same is true here.

[7] In my view, *Smith* does not assist the moving defendants. It is a case in which the responding defendants capitulated at the hearing and consented to an order compelling answers to all of the undertakings and refusals sought by the plaintiff on the motion. It is not a case where the parties negotiated a resolution of the motion on specific terms that varied from the relief initially sought. That is the situation before me. The plaintiff has not capitulated by consenting to the relief sought. In my view, the draft consent order reflects a negotiated settlement of the motion, whereby the parties reached consensus on which answers had been satisfied and those that were not. It also includes an order to provide answers to questions that were not the subject matter of my prior order.

[8] I agree with the moving defendants' submission, at least to an extent, that the fact of a consent order compelling further answers is some acknowledgment that undertakings remained outstanding. However, I have limited transparency into the discussions and negotiations between counsel with respect to this motion, including why the primary relief was not ultimately pursued. I do not know whether the moving defendants were convinced that answers they otherwise felt were outstanding were, in fact, sufficiently answered, or, conversely, whether the plaintiff was convinced that further answers were required.

[9] Notably, I have been persuaded by the plaintiff's submissions and several examples cited by both counsel during their submissions that some of the answers provided in May 2024 (before most of the moving defendants' claimed costs were incurred) were sufficient, that certain of the moving defendants' concerns are more properly viewed as questions arising from the answers, and that the plaintiff has voluntarily agreed to provide certain additional documents and answers beyond the scope of relevant undertakings. These all support that the plaintiff and moving defendants made concessions and compromises to resolve the motion.

[10] I note also that the moving defendants claim their costs for settlement discussions with plaintiff's counsel from July 18, 2024, totalling 13.3 hours. That is essentially two full business days between July 18, 2024 (Thursday) and the hearing on July 22, 2024 (Monday). It is unclear how defendant's counsel incurred such significant docketed time in the few days before this motion was heard, in addition to the other work reflected in the costs outline that reasonably must have occurred in the same period. Similar time is not reflected on the plaintiff's costs outline. Regardless, since I am unable to determine if the negotiated resolution of this motion was more favourable to the plaintiff or the moving defendants, or equally beneficial to both of them, it is difficult to find that these settlement discussion costs should be recoverable by the defendants as costs of the motion.

[11] All of the above supports the plaintiff's position that each side should bear their own costs. Nevertheless, I am not convinced that is a fair result. Compliance with my prior order and providing the long-outstanding answers to undertakings only came after this motion was brought. The moving defendants submit that this motion was necessary since there had been no response or movement by the plaintiff. None of the ordered answers to undertakings had been provided and the ordered costs remained unpaid. I agree that, based on the record before me, this motion was necessary to prompt compliance by the plaintiff.

[12] The moving defendants submit that, when answers were ultimately provided in May 2024, they were disorganized and defendants' counsel had to invest significant time to "navigate" the productions. These costs are, as I understand it, the bulk of the moving defendants' costs claim. In my view, though, such costs are not properly viewed as costs of the motion. The time and expense of reviewing answers to undertakings, assessing compliance, and communicating with opposing counsel about insufficiency of answers are all costs of the action. They were not incurred because of this motion.

[13] Additionally, I am not convinced that defendants' counsel was obliged to invest the time that was invested to sort and cross-reference the plaintiff's answers. Albeit in a different context, in my decision in *Kamlu Engineering Inc. v Cadorin Homes*, 2023 ONSC 2940, at para. 22, I held that production of Schedule A documents without delineating and correlating the documents to the affidavit of documents did not accord with the reasonable expectations of parties in civil litigation and was essentially useless. My view is the same for answers to undertakings. It is incumbent on parties to provide their answers to undertakings, including related documents, in an organized fashion that clearly sets out which answers and documents relate to which undertakings and questions under advisement.

[14] Defendants' counsel rightly submits that the onus was on the plaintiff to comply with its undertakings. The defendants were under no obligation to provide lists of undertakings or follow up for answers. As set out in s. 40(4) of the *Construction Act*, the rules of court pertaining to examinations apply, with necessary modifications, to cross-examinations under s. 40. Subrule 31.07(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*") provides that a party who has failed to answer discovery questions cannot tender that evidence at trial without leave of the court. It follows that the plaintiff was obliged to answer its undertakings without any prompting by the defendants, and to do so in an organized manner, particularly if it intended to rely on any of that evidence in proving its lien.

[15] I accept that the moving defendants incurred significant time reviewing the 253 pages of documents served in May 2024 and the further 198 pages of documents served ten days before the motion hearing in July 2024. Appendix "B" to the moving defendants' costs outline provides details of the correlative work performed by defendants' counsel. I am not convinced that it was necessary to prepare that document. Nevertheless, it supports the moving defendants' position that the plaintiff's answers to undertakings were quite disorganized and that defendants' counsel undertook significant efforts to examine the answers and documents provided.

[16] In my view, though, rather than spending substantial time reviewing and correlating the answers to determine their sufficiency, it was open to the moving defendants to insist on the plaintiff providing properly organized answers to undertakings with reference to specific undertakings and, if that was not done, to seek relief from the court compelling the plaintiff to do so. Had that been done, much of the legal costs incurred may well have been avoided, or they would have at least been reduced.

[17] I accept that defendants' counsel did make several requests, which were not addressed. However, the moving defendants then opted to have their lawyer perform a detailed review, which was done of their own volition. By the same token, though, when the plaintiff provided

disorganized answers to undertakings and uncorrelated documents, it must reasonably have expected that the moving defendants would be incurring additional legal costs to sort them. Regardless, as discussed above, these are costs of the action, not this motion. The fact that the plaintiff provided answers after this motion was brought does not make the costs of reviewing those answers costs of the motion.

[18] I would reduce the costs claim by the costs associated with the review and correlation work, but I cannot do so. I am unable to discern how much of the costs claim relates to reviewing and correlating the documents. There are several blocks in the costs outline, but all of the motion material work is in a single block aggregating to nearly 65 hours of docketed time. Defendants' counsel confirmed during oral submissions that the review time is included. The description refers to preparing motion materials, which comprised a motion record, a supplementary motion record, a second supplementary motion record, a third supplementary motion record, a fourth supplementary, a factum, and a revised factum. The same block also includes communications with counsel and client. There is no breakdown of how much time was spent sorting and reviewing answers to undertakings, how much time was spent preparing motion materials, and how much time was spent on communications with opposing counsel and the defendants.

[19] Apart from the foregoing, the costs outline further seeks costs for "preparing enforcement materials", which is noted to include a "list of breaches" and a writ of seizure and sale. All of the claimed disbursements relate to the writ of seizure and sale, PPSA searches, and related process server expenses. It is unclear how any of these fees and disbursements are properly claimable as costs of the motion. No relief was sought in the notice of motion under rule 60.19 of the *Rules*, which governs recoverable costs from enforcement of an order. It is not addressed in the factum. No submissions were made on why such costs are recoverable as costs of this motion.

[20] The only time on the costs outline that clearly relates exclusively to this motion are two blocks of lawyer time totalling 9.0 hours for preparing costs submissions (5.0 hours) and, separately, preparing for the hearing, including costs submissions (4.0 hours), plus a further 2.6 hours of clerk time for preparing the costs outline. In my view, that time is excessive. It is also confusing. Counsel appeared with a consent order and asked that I deal with costs in writing, so the need for 4.0 hours of motion preparation time is unclear.

[21] In making the foregoing comments about the moving defendants' costs outline, I do not doubt that the time claimed has actually been spent. Nevertheless, in my view, there is a distinction between amounts actually incurred by lawyers and legal staff, amounts properly billable to clients, and amounts that are properly claimable as costs of a motion when considering the reasonable expectations of the parties, the nature of the motion, and the relief actually sought.

[22] In lien actions, costs must also be assessed with ss. 50(3) and 86(2) of the *Construction Act* in mind. The former provides that lien actions are to be as far as possible of a summary character, having regard to the amount and nature of the liens in question. The latter provides that, where a party fails to take the least expensive course, the costs awarded to that party shall not exceed what would have been incurred had the least expensive course been taken.

[23] I am satisfied that the plaintiff breached my prior order. There was no compliance at all until after this motion was brought. In my view, that is sufficient to order that the plaintiff bear its own costs.

[24] As already noted, I am not prepared to deny the moving defendants any costs of this motion. However, given the foregoing, I am unable to meaningfully assess their actual costs of the motion separate from other costs of the action that the moving defendants have included in their costs outline. As a result, I cannot fix a fair and reasonable amount of costs for the motion and, in the same vein, cannot assess the reasonableness of the moving defendants' offer to settle costs for the plaintiff to pay $12,000, which was made the business day prior to the motion hearing.

[25] In all the circumstances, I have decided that the moving defendants shall be awarded no costs of the motion at this time, but that order shall be without prejudice to the moving defendants claiming all costs included in their costs outline as costs of the action. If claimed in the litigation, then the moving defendants must better particularize the costs with respect to what was incurred for reviewing and correlating the answers, drafting motion materials, and the like. Substantial block categories capturing multiple areas of work are unhelpful to the court, particularly absent supporting dockets. Whether or not the costs are recoverable will be at the discretion of the judicial official deciding costs of the action, taking into account my comments in this endorsement as they deem appropriate.

[26] For the foregoing reasons, there shall be no order as to costs, subject to the caveat that I have made above. Order accordingly.

[27] Following the hearing, the parties were to have submitted a revised draft order to my Assistant Trial Coordinator addressing certain concerns I raised over clarity of the consent order provided to me. They have still not yet done so. If they intend to have a formal order embodying the agreed terms on which the motion was settled, then the revised order should be submitted or a case conference arranged to address any disputes over the form of order.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: October 25, 2024