CITATION: Beraskow v. TD Insurance and ServiceMaster of Ottawa, 2018 ONSC 6419
DIVISIONAL COURT FILE NO.: 18-144365
DATE: 2018/11/22

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISONAL COURT

B E T W E E N:	)	
Alex Beraskow	)	David Contant for the Appellant
Appellant (Plaintiff)	)	
– and –	)	
TD Insurance and ServiceMaster of Ottawa	)	**David Perron for the Respondent TD Insurance** Robert J. De Toni for the Respondent ServiceMaster
Respondent (Defendant)	)	
	)	**HEARD: September 19, 2018**

AMENDED DECISION – SEE UNDERLINED AND BOLDED TEXT

REASONS FOR DECISION

O'BONSAWIN J.

Background

[1] This is an appeal by Alex Beraskow from an Order of Deputy Judge Conway ("trial judge") of the Ottawa Small Claims Court dated January 9, 2018, who dismissed Mr. Beraskow's claim against both Defendants. The trial took place on October 19, 20, and December 1, 2017. Written submissions were completed December 22, 2017. The trial judge invited the parties to file written submissions if they could not settle the issue of costs. They were not able to settle the issue of costs. The trial judge awarded costs in the amount of

$5,606.76 to TD Insurance ("TD") and in the amount of $6,320.96 to ServiceMaster Ottawa ("ServiceMaster").

[2] Mr. Beraskow is a professional engineer. On January 6, 2014, a pipe burst and flooded the basement of his property. Due to the flood, his cork flooring was damaged. Mr. Beraskow's insurer, TD, provided coverage for the loss.

[3] At the request of TD, ServiceMaster attended Mr. Beraskow's property. ServiceMaster provided a quote for remediation work including the removal and replacement of the damaged cork flooring. ServiceMaster was retained to fix the flooring.

[4] The replacement cork flooring was manufactured by Torlys and was selected by Mr. Beraskow. ServiceMaster sub-contracted the flooring installation to Access Flooring. The installation of the new cork flooring was completed in or about March 2014.

[5] Mr. Beraskow complained that the cork flooring was not properly installed since there was a noticeable "checkerboard" effect. He also alleged that the required vapour barrier was not installed in accordance with the manufacturer's specifications.

[6] Following the installation, TD issued a cheque payable to both Mr. Beraskow and ServiceMaster. ServiceMaster cashed the cheque in June 2014, without Mr. Beraskow's signature. It must be noted that Mr. Beraskow repeatedly insisted that ServiceMaster get paid. Ultimately, ServiceMaster returned the entire payment to TD pending the outcome of the court action.

[7] Mr. Beraskow asks this Court to set aside the trial judge's Order and grant him Judgment in the amount of $16,000 payable by the Defendants, plus pre-judgment interest and costs payable in the amount of $2,400 plus HST. In the alternative, Mr. Beraskow asks that the matter be returned for a new trial. In the further alternative, Mr. Beraskow requests that costs not be awarded in respect of the trial proceedings or that those costs be reduced to the amount of $2,400, which represents 15% of the amount claimed.

Position of the Parties

[8] Mr. Beraskow argues as follows:

- the trial judge erred in failing to meet her responsibilities to Mr. Beraskow as a self-represented litigant;
- the trial judge erred in taking a view of the property and the cork flooring;
- the trial judge erred in failing to permit Mr. Beraskow to file additional evidence;
- the trial judge erred in finding that ServiceMaster acted in good faith when cashing the cheque that was co-payable to Mr. Beraskow; and
- the trial judge erred in finding that the claim for failing to install the vapour barrier was statute-barred.

[9] ServiceMaster argues that the trial judge did not commit any errors. **TD supports ServiceMaster's position.**

Issues

[10] This matter raises the following issues:

1) Did the trial judge err in failing to meet her responsibilities to Mr. Beraskow as a self-represented litigant?
2) Did the trial judge err in taking a view of the property and the cork flooring?
3) Did the trial judge err in failing to permit Mr. Beraskow to file additional evidence?
4) Did the trial judge err in finding that ServiceMaster acted in good faith when cashing a cheque co-payable to Mr. Beraskow?
5) Did the trial judge err in finding that the claim for failing to install the vapour barrier was statute-barred?

Analysis

[11] The standard of review for decisions in the Small Claims Court is outlined in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. At paragraphs 8, 10 and 37, the Supreme Court states:

> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness …
>
> …
>
> 10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error" …
>
> …
>
> 37 … [A question of mixed fact and law] is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the [legal] standard or its application, in which case the error may amount to an error in law.

[12] Since this appeal deals with issues of mixed fact and law, the standard of review is whether the trial judge made a palpable and overriding error.

1) Did the trial judge err in failing to meet her responsibilities to Mr. Beraskow as a self-represented litigant?

[13] In his Factum, Mr. Beraskow references the Statement of Principles on Self-Represented Litigants and Accused Persons issued by the Canadian Judicial Council ("the Statement"). The relevant portions of the Statement provide as follows:

> For the Judiciary
>
> 1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
>
> 2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

> 3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.
>
> 4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.
>
> For Self-Represented Persons
>
> 1. Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case.
>
> 2. Self-represented persons are expected to prepare their own case.
>
> 3. Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process
>
> (Canadian Judicial Council, "Statement of Principles on Self-represented Litigants and Accused Persons", (September 2006) at 7, 9).

[14] In *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2008 ONCA 685, 93 O.R. (3d) 139, the Court of Appeal concluded that a trial judge must attempt to accommodate the self-represented litigant's unfamiliarity with the process in order to permit him/her to present his/her case. However, the trial judge must respect the rights of the opposing party. In addition, the trial judge must not appear to assume or in fact assume the role of counsel for the self-represented litigant (at paras. 57-58). The questions to be asked are whether the proceedings were fairly conducted and whether or not the self-represented litigant received a fair hearing (at para. 59).

[15] ServiceMaster argues that in considering the application of the section regarding the Self-Represented Person of the Statement, the level of the self-represented litigant's sophistication and experience in court matters ought to be taken into account. In this matter, Mr. Beraskow is a professional engineer who acted as the general contractor for the building of his house and hired 50 trades people to build it. During his cross-examination, Mr. Beraskow admitted that he had been involved in various Small Claims Court matters, five of which were related to his house. A sixth matter was unrelated to his home. This demonstrates that Mr. Beraskow is not new to the legal arena and has experience dealing with Small Claims Court matters.

[16] I have reviewed the transcripts of the trial. For example, at the beginning of the trial, Mr. Beraskow did not understand the notion of excluding witnesses. Accordingly, the trial judge

explained to him what this meant in order for him to make a decision on this issue (see: October 19, 2017 Transcript, at 1). In addition, the trial judge interrupted on many occasions to assist Mr. Beraskow. For example, when Mr. Beraskow was examining Mr. Allen, opposing counsel objected on the basis that he was leading the witness. The trial judge explained to Mr. Beraskow what this meant and how to properly ask questions of his witness. She also explained that he had to lay some foundation for the questions that he was asking.

[17] Furthermore, during the trial, ServiceMaster made a motion for a view. Mr. Beraskow argues that the trial judge did not explain the reference to the *Rules of the Small Claims Court*, O. Reg. 258/98 or Rule 52.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. A trial judge need not explain the rules *per se* but must explain the notion of taking a view. In this case, the trial judge commented about taking a view which placed Mr. Beraskow in a position to make an informed decision as to whether or not he consented to the trial judge taking a view.

[18] Based on the record I have reviewed, it is clear that the trial judge properly assisted Mr. Beraskow within the confines of her obligations. It is important to note that the role of the trial judge is not to act as counsel for the self-represented litigant. As a self-represented litigant, Mr. Beraskow is still expected to prepare his case and familiarize himself with the relevant legal practices and procedures pertaining to it. Notwithstanding, where Mr. Beraskow was lacking regarding legal practices and procedures, the trial judge properly assisted him. Consequently, I do not find that the trial judge committed an overriding and palpable error on this issue.

2) Did the trial judge err in taking a view of the property and the cork flooring?

[19] Mr. Beraskow argues that the trial judge erred when she took a view of his property and that she referred to the wrong set of rules, more specifically, she referred to Rule 52.05 of the *Rules of Civil Procedure*. Both Rule 17.03 of the *Rules of Small Claims Court* and Rule 52.05 of the *Rules of Civil Procedure* deal with taking a view. Rules 17.03 states: "The trial judge may, in the presence of the parties or their representatives, inspect any real or personal property concerning which a question arises in the action". Rule 52.05 states: "The judge or judge and jury by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their lawyers, inspect any property concerning which any question arises in the action, or the place where the cause of action arose".

[20] When Ms. Cardill, counsel for ServiceMaster, brought the motion for a view, she referred the trial judge to Rule 52.05 of the *Rules of Civil Procedure.* Even if the trial judge took a view of Mr. Beraskow's property in line with Rule 52.05, she had the authority to do so under Rule 17.03 of the *Rules of Small Claims Court.*

[21] At paragraph 26 of her Judgment, the trial judge noted that "[w]hile I did take a view, this cannot inform me in any way other than as aid to my review of the evidence given in court: see *Chambers v. Murphy et* al. 1953 CarswellOnt215 and *Chen (Litigation Guardian of) v. Toronto Transit Commission* 2014 ONSC 4092 at para. 11)". These are appropriate comments.

[22] Consequently, based on my review of the record, I find that the trial judge did not commit an overriding and palpable error regarding the view.

3) Did the trial judge err in failing to permit Mr. Beraskow to file additional evidence?

[23] Rule 18.02(2) of the *Rules of the Small Claims Court* provides that the trial judge has discretion to accept or reject evidence. Based on the evidence before her, the trial judge had the discretion to reject the introduction of flooring samples as an exhibit. There is no evidence to support that the trial judge inappropriately exercised her discretion in this regard.

[24] Consequently, based on my review of the record, I find that the trial judge did not commit an overriding and palpable error regarding the additional evidence.

4) Did the trial judge err in finding that ServiceMaster acted in good faith when cashing a cheque co-payable to Mr. Beraskow?

[25] Mr. Beraskow argues that ServiceMaster had no authority to cash the co-payable cheque and acted in bad faith when it did so. There is no evidence to support the allegation that ServiceMaster acted in bad faith. Quite to the contrary, ServiceMaster tried to work with Mr. Beraskow to address his concerns. In addition, the evidence supports that Mr. Beraskow repeatedly insisted that ServiceMaster should be paid.

[26] In paragraph 29 of her Judgment, the trial judge determined that ServiceMaster "showed good faith by returning their entire payment to TD Insurance, pending the outcome of the litigation". It is trite law that the trial judge is entitled to deference on finding of facts.

[27] Consequently, based on my review of the record, I find that the trial judge did not commit an overriding and palpable error regarding the issue of cashing the cheque.

5) Did the trial judge err in finding that the claim for failing to install the vapour barrier was statute-barred?

[28] Mr. Beraskow argues that the amendment to his Claim, which added the allegation regarding the alleged lack of vapour barrier, was not statute-barred since it served to further particularize a cause of action that already existed.

[29] In her Judgment, the trial judge stated:

> I find that the vapour barrier was installed. My reasons for doing so are that Joaquin Allen was a credible witness, he has 10 years of experience, and he testified that he spent the better part of a week installing the floor, which floats and is snapped together. That it took that long to install the floor is itself evidence that the vapour barrier was installed. His evidence is corroborated by that of Rick Applejohn who brought the vapour shield to the house, and came to check on the work. Both witnesses testified that when Mr. Allen lifted the tiles in 2017 at the plaintiff's request, the barrier could be seen underneath. The plaintiff declined to have further tiles lifted (at para. 27).
>
> His original claim, filed on February 5, 2014, did not mention the vapour barrier, and, even though he had no independent evidence that it had not been installed, he added this to his amended claim which was filed on July 21, 2017, over three years after the work was completed (at para. 34)
>
> I have found as a fact that the vapour barrier was installed, but TD bore no connection to that, in any event. I find that the limitation period expired on January 7, 2016, two years and one day after the claim was reported. During that period, the insurer fulfilled their obligations (at para. 35).
>
> I note that the claim for failing to install the vapour barrier was not made until the Amended Claim was filed on July 21, 2017, and it is statute-barred (at para. 37).

[30] Based on the record, the additional issue regarding the vapour barrier did not serve to further particularize a cause of action that already existed. It was not related to the insurance claim. The trial judge appropriately found that the issue regarding the vapour barrier was statute-barred.

[31] Consequently, based on my review of the record, I find that the trial judge did not commit an overriding and palpable error regarding the issue of the vapour barrier.

Costs

[32] Rule 19.02 of the *Rules of Small Claims Court* states: "Any power under this rule to award costs is subject to section 29 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which limits the amount of costs that may be awarded". Section 29 states:

> An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding.

[33] Since there was an offer to settle in this matter, the trial judge found that she did "not need to determine if the plaintiff acted unreasonably, as [she] [could] decide this case under Rule 14 (see *Beraskow v. TD Insurance*, [2018] O.J. No. 1594 (S.C.), at para. 15). Rule 14.07(2) of the *Rules of the Small Claims Court* discusses the costs consequences of a Plaintiff's failure to accept an offer to settle. It states as follows:

> (2) When a defendant makes an offer to settle that is not accepted by the plaintiff, the court may award the defendant an amount not exceeding twice the costs awardable to a successful party, from the date the offer was served, if the following conditions are met:
>
> 1. The plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer.
>
> 2. The offer was made at least seven days before the trial.
>
> 3. The offer was not withdrawn and did not expire before the trial.

[34] The trial judge found that there was uncontroverted evidence that the offers to settle from the Defendants remained outstanding as the trial began. In line with Rule 14.07(2), the trial judge awarded the amount of $4,800 for ServiceMaster's legal fees. In total, including disbursements, she awarded costs payable by Mr. Beraskow to ServiceMaster in the amount of $6,320.96. The trial judge awarded the same amount of $4,800 for TD's legal fees. In total,

including disbursements, she awarded costs payable by Mr. Beraskow to TD in the amount of $5,606.76.

[35] The trial judge's award regarding the legal costs related to this lengthy trial (for a Small Claims Court matter) was appropriate and in line with the Rules. She did not commit and overriding and palpable error in law, and therefore, I do not amend the amounts granted for costs.

[36] With regards to this appeal, ServiceMaster **and TD** were successful in this matter and argue that **they are** entitled to receive **their** reasonable costs. I invited both parties to make submissions on this issue and they each provided me with a Bill of Costs for this appeal.

[37] ServiceMaster retained Mr. DeToni at an hourly rate of $425. Mr. DeToni also had the assistance of two junior lawyers, one at an hourly rate of $200 and another at an hourly rate of $150. Costs are listed at partial indemnity rate of $9,588.07 including fees, disbursements, and HST.

[38] TD retained Mr. Perron at an hourly rate of $165. Mr. Perron also had the assistance of Mr. Brown at an hourly rate of $305. Costs are listed at a partial indemnity rate of $8,546.19 including fees, disbursements and HST.

[39] The over-riding principle in awarding costs is of the reasonable expectation of the unsuccessful party, taking into consideration the factors set out in Rule 57 of the *Rules of Civil Procedure,* and the Court's inherent discretion as per sub-section 131 of the *Court of Justice Act*.

[40] A successful party is presumptively entitled to costs in a reasonable amount (*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)). The amount awarded is intended to be fair and reasonable for the unsuccessful party, but not fixed by the actual costs incurred by the successful party (*Boucher* at paras. 24, 26).

[41] Parties often argue that costs should follow the event. This was confirmed in *Schreiber v. Mulroney*, 2007 CanLII 31754 (Ont. S.C.), at para. 2. Substantial indemnity costs are the exception to the rule.

[42] I have taken into consideration the factors in Rule 57.01(1), for example, that the matter was not complex, the issues were important to ServiceMaster and **TD**, and the fact that I did not conclude that the conduct of the parties were inappropriate. I find that the amount claimed is reasonable and I have exercised my discretion to award costs to ServiceMaster on a partial indemnity basis in the amount of $9,588.07, inclusive of fees, disbursements and HST **and to TD on a partial indemnity basis in the amount of $8,546.19, inclusive of fees, disbursements and HST.**

Conclusion

[43] Based on all of the reasons noted above, I find that the trial judge did not commit any errors. Consequently, Mr. Beraskow' appeal is dismissed.

[44] I order as follows:

1) Mr. Beraskow' appeal is dismissed; and

2) Mr. Beraskow must pay ServiceMaster's reasonable costs in the amount of $9,588.07 (inclusive of fees, disbursements and HST) **and TD's reasonable costs in the amount of $8,546.19 (inclusive of fees, disbursements and HST)**. This amount is to be paid within 30 days of this Decision.

M. O'Bonsawin J.

Justice M. O'Bonsawin

Released: November 22, 2018

CITATION: Beraskow v. TD Insurance and ServiceMaster of Ottawa, 2018 ONSC 6419
DIVISIONAL COURT FILE NO.: 18-2374
DATE: 2018/11/22

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

Alex Beraskow

Appellant (Plaintiff)

– and –

TD Insurance and ServiceMaster of Ottawa

Respondents (Defendants)

AMENDED DECISION – SEE UNDERLINED AND BOLDED TEXT

REASONS FOR DECISION

O'Bonsawin J.

Released: November 22, 2018